

# Note

## With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking

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# I. INTRODUCTION: FROM THE RIGHT TO INTERVENE TO THE RESPONSIBILITY TO PROTECT

State sovereignty has long been regarded as the pivotal structural paradigm of international law.<sup>1</sup> Its recognition in Article 2(1) of the U.N. Charter as a fundamental, albeit qualified, principle of the United Nations is only one of many indicators that it has not forfeited its significance. At the same time, the rising importance of the protection of human rights raises the question of how to reconcile the inherent tension between these two principles. In the modern international legal order, it has become clear that the treatment of human beings within the territorial boundaries of a state does not belong to the *domaine réservé* that excludes interferences from the outside. Yet it is far from clear how the international community—represented through the United Nations, regional organizations, and individual states or groups of states—should act and is allowed to act when a state commits major human rights violations such as genocide, war crimes, ethnic cleansing, or crimes against humanity. When diplomatic efforts and political or economic sanctions fail, military action in the form of a humanitarian intervention is often considered as a last resort.

Following the Cold War and the revitalization of the U.N. system of collective security, the question of the legality and legitimacy of humanitarian intervention gained practical importance. In the 1990s, massive human rights violations led to fierce debate, especially in cases where the U.N. Security Council did not authorize an intervention. In 1994, the international community failed to prevent the genocide in Rwanda due to the lack of political will and determination among the main political actors. The North Atlantic Treaty Organization's (NATO) bombing of Kosovo in 1999 to end ethnic cleansing and other mass atrocities, despite the absence of Security Council authorization, added to the controversy. By the end of the twentieth century, the world was deeply divided into proponents who regarded humanitarian intervention as often the only effective means to address massive human rights violations and critics to whom humanitarian intervention was nothing but a rhetorical and euphemistic pretext under which the great powers pursued their imperialist self-interests through coercive measures.

Against this background, the concept of the responsibility to protect constitutes an attempt to change the prefix of the ongoing debate about the legality and legitimacy of humanitarian intervention.<sup>2</sup> At the core of the concept lies a two-dimensional understanding of responsibility: (1) the responsibility of a state to protect its citizens from atrocities, and (2) the responsibility of the international community to prevent and react to massive human rights violations. The concept moves the debate past the controversial notion of "humanitarian intervention" to a "responsibility to protect," thereby focusing on the perspective of the victims of human rights violations. Conceptually it tries to cut the Gordian knot of the tension between

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1. See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 48 (2d ed. 2005).

2. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter ICISS REPORT].

sovereignty and human rights by embedding the notion of human rights in the idea of state sovereignty. Under this premise, intervention within a state that fails to protect its citizens from massive human rights violations does not constitute an intrusion into that state's sovereignty, but rather appears as the realization of a responsibility which is shared by the state and by the international community.

The introduction of the responsibility to protect has significantly changed the grammar of political discourse with regard to the prevention of and reaction to massive human rights violations. The implications of the concept for the international legal order, however, are seldom analyzed in greater depth. If its legal dimension is discussed, the responsibility to protect is usually regarded as a legal norm *de lege ferenda*, as an emerging norm of customary international law.<sup>3</sup> Proponents of this approach regularly do not provide much evidence for the existence of such a process, nor do they elaborate how and under which conditions the responsibility to protect could emerge as a norm of customary international law.

In this Note, I reject this contemporary understanding of the responsibility to protect. Instead I argue that the responsibility to protect cannot be understood as an emerging international legal norm, and any such characterization is misleading. As a multifaceted and holistic concept, the responsibility to protect lacks specific normative content and does not "indicat[e] to a designated audience that certain things must henceforth be done or forborne."<sup>4</sup> I also demonstrate that the conceptual change in the understanding of sovereignty cannot, by itself, lead to a change in international law. The concept does, however, touch upon a number of existing norms or potential norms of international law, and the increasing political recognition of the concept raises the question whether endorsement of the responsibility to protect may have a legal impact on these norms. The concept of the responsibility to protect therefore has to be viewed within the context of the existing international legal system of the use of force and collective security as it is defined and shaped primarily by the U.N. Charter. An analysis of the legal dimension of the responsibility to protect must not focus on the legal status of the concept. Rather, it must examine whether and how the concept of the responsibility to protect, and especially the behavior and statements of the relevant international actors in the context of the development of the concept, may have changed the legal content of the existing norms which form the basis of the international system of collective security.

The argument begins in Part II with an inquiry into the evolution and content of the responsibility to protect from its establishment in 2001 until the consultation of the subject by the 63rd Session of the U.N. General Assembly in July 2009. Part III then outlines the process of international lawmaking in which the responsibility to protect can influence the substantive corpus of international law. Against this doctrinal background, Part IV evaluates

3. *Id.* ¶¶ 2.24, 6.17; see *infra* Part III.

4. W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 16 (Rüdiger Wolfrum & Volker Röben eds., 2005).

whether and how the concept has already influenced the specific norms which constitute the international legal framework for the use of force and collective security. Concluding remarks in Part V will assess and evaluate the impact of the responsibility to protect on the international legal order.

The analysis will result in the counterintuitive outcome—given the controversy around the concept—that the responsibility to protect does not entail revolutionary changes within the existing legal framework. In the Conclusion, I will show why this rather conservative approach to the legal status of the responsibility to protect is to be welcomed and may expedite the acceptance of the responsibility to protect in the long run.

## II. EVOLUTION AND CONTENT OF THE RESPONSIBILITY TO PROTECT

### A. *The Report of the International Commission on Intervention and State Sovereignty (2001)*

In his Millennium Report to the General Assembly in 2000, then-Secretary-General of the United Nations Kofi Annan addressed the issue of humanitarian intervention.<sup>5</sup> Moved by the humanitarian catastrophes of the 1990s, he acknowledged critics' concerns about the concept of humanitarian intervention and its application in practice.<sup>6</sup> But with regard to the need to react to humanitarian catastrophes within the territory of a state, Kofi Annan then posed the much cited question: "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"<sup>7</sup> In his statement humanity and sovereignty appear as two conflicting principles, and the question arises: "[W]hich principle should prevail when they are in conflict?"<sup>8</sup>

Responding to Annan's appeal, the government of Canada established the International Commission on Intervention and State Sovereignty<sup>9</sup> (ICISS) and tasked it to approach the problem of humanitarian intervention in a comprehensive manner, with the aim of finding global common ground. In December 2001, the Commission, co-chaired by Gareth Evans and Mohamed Sahnoun, issued its report entitled *The Responsibility To Protect*, and the concept prominently entered the international stage.

The ICISS Report proposes a conceptual change in the discussion about humanitarian intervention. First, it suggests shifting the debate from the "right to intervene" to the "responsibility to protect."<sup>10</sup> The aim of this "rhetorical trick"<sup>11</sup> is not only to avoid—at least terminologically—the highly disputed term of humanitarian intervention, but also to broaden the concept away from

5. The Secretary-General, *Report of the Secretary-General, We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶¶ 215-219, U.N. Doc. A/54/2000 (Mar. 27, 2000).

6. *Id.* ¶¶ 216-217.

7. *Id.* ¶ 217.

8. *Id.* ¶ 218.

9. For a comprehensive account of the work of the ICISS and the development of its report, see ALEX J. BELLAMY, *RESPONSIBILITY TO PROTECT* 35-65 (2009).

10. ICISS REPORT, *supra* note 2, ¶¶ 2.28-.33.

11. Carsten Stahn, *Responsibility To Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 102 (2007).

mere intervention to a more comprehensive approach that also comprises prevention and post-conflict support.<sup>12</sup> Furthermore, it suggests a change in perspective away from the point of view of those who try to justify intervention to the perspective of those who are affected and seek support.<sup>13</sup> Second, the concept tries to dissolve the tension between state sovereignty and intervention by emphasizing that sovereignty implies a responsibility of the state to protect its citizens from human rights violations.<sup>14</sup> Human rights and the concept of human security are thus not conceived of as limitations but rather as inherent elements of sovereignty. When the state is unable or unwilling to fulfill its sovereign responsibility, "it becomes the responsibility of the international community to act in its place."<sup>15</sup> Under this assumption, intervention does not contradict the principle of sovereignty, but rather complements it where a state does not live up to its responsibility.<sup>16</sup>

The ICISS Report divides the responsibility to protect into three sub-responsibilities: the responsibility to prevent, to react, and to rebuild.<sup>17</sup> The responsibility to prevent consists of measures aimed at avoiding massive human rights violations in the first place. It emphasizes the importance of early warning mechanisms and root-cause conflict prevention, as well as diplomatic, economic, and military instruments to confine a conflict before it escalates.<sup>18</sup> The responsibility to rebuild comprises responsibilities which arise after a conflict, particularly after a military intervention has been conducted, and aims to support the sustainable development of a stable and safe society.<sup>19</sup> The responsibility to react constitutes the normative core of the responsibility to protect. It applies when massive human rights violations occur in a state and that state is either unable or unwilling to protect its citizens. In this case, coercive measures short of military action should be taken, including diplomatic, economic, or military sanctions such as arms embargoes or financial restrictions.<sup>20</sup> Military action should only be acceptable in extreme cases of large-scale loss of life or ethnic cleansing and when four criteria are met: (1) military interventions have to be motivated by the right intention; (2) they must be the last resort; (3) they must be proportional; and, (4) there must be a reasonable chance of ending the suffering.<sup>21</sup>

The development of criteria for legitimizing humanitarian intervention does not, however, answer the pressing question of who can authorize intervention. In this regard, the ICISS Report takes a rather cautious approach and emphasizes the pivotal role of the Security Council under the U.N. Charter.<sup>22</sup> Should the Security Council fail to react, the report considers action

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12. ICISS REPORT, *supra* note 2, ¶¶ 2.28-.29.

13. *Id.* ¶ 2.29.

14. *Id.* ¶¶ 1.35, 2.15.

15. *Id.* ¶ 2.29.

16. Jeremy I. Levitt, *The Responsibility To Protect: A Beaver Without a Dam?*, 25 MICH. J. INT'L L. 153, 157 (2003) (book review).

17. ICISS REPORT, *supra* note 2, ¶ 2.29.

18. *Id.* ¶¶ 3.1-.43.

19. *Id.* ¶¶ 5.1-.31.

20. *Id.* ¶¶ 4.3-.9.

21. *Id.* ¶¶ 4.19, 4.32-.43.

22. *Id.* ¶¶ 6.13-.15.

by the General Assembly under the Uniting for Peace Resolution<sup>23</sup> to be a possible alternative that would “provide a high degree of legitimacy for an intervention.”<sup>24</sup> The report also mentions the action of regional organizations, although it highlights that according to the U.N. Charter, such action can only be taken with authorization of the Security Council.<sup>25</sup> Concerning the most controversial question, humanitarian intervention without Security Council authorization, the report on the one hand observes the lack of a global consensus, while on the other hand avoids explicitly deeming such interventions illegal.<sup>26</sup> The ICISS Report points out that there will be damage to the international order if the Security Council is bypassed. But it also emphasizes that there will be “damage to that order if human beings are slaughtered while the Security Council stands by.”<sup>27</sup> The ICISS thereby cautions the Security Council that single states or coalitions might take action if the Council fails to live up to its responsibility.<sup>28</sup>

The ICISS Report ultimately recommends that the General Assembly endorse the responsibility to protect, that the members of the Security Council try to find agreement on principles for military intervention, that the permanent members of the Security Council agree to restrict the use of their veto power in cases where humanitarian intervention is necessary and their vital state interests are not involved, and that the Secretary-General consider how the responsibility to protect can best be advanced.<sup>29</sup>

B. *The Report of the High-Level Panel on Threats, Challenges and Change (2004)*

The concept of the responsibility to protect, as developed in the ICISS Report, was then considered by the High-Level Panel on Threats, Challenges and Change, convened by then-Secretary-General Annan in order to evaluate the adequacy of existing policies and institutions with regard to current threats to international peace and security. Like the ICISS, the High-Level Panel highlights the responsibility of the state for the welfare of its people as well as the collective international responsibility to protect.<sup>30</sup> The panel confirms the competence of the Security Council to act under Chapter VII of the U.N. Charter when massive human rights violations occur,<sup>31</sup> and urges the permanent members to refrain from using the veto in cases of genocide and large-scale human rights abuses.<sup>32</sup> In conclusion, the High-Level Panel endorses “the emerging norm that there is a collective international

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23. Uniting for Peace, G.A. Res. 377 (V), U.N. Doc. A/1775 (Nov. 3, 1950).

24. ICISS Report, *supra* note 2, ¶¶ 6.29-.30.

25. *Id.* ¶¶ 6.31-.35.

26. *Id.* ¶¶ 6.36-.37.

27. *Id.* ¶ 6.37.

28. *Id.* ¶ 6.39.

29. *Id.* ¶¶ 8.28-.30.

30. *Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility*, ¶¶ 29, 36, 202-203, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *High-Level Panel Report*].

31. *Id.* ¶¶ 200, 202.

32. *Id.* ¶ 256.

responsibility to protect” which is to be exercised by the Security Council.<sup>33</sup> It invites the Security Council and the General Assembly to use the developed guidelines for authorizing force in declaratory resolutions.<sup>34</sup>

Nevertheless, the High-Level Panel Report significantly departs from the ICISS Report. The High-Level Panel focuses much more on action taken by the Security Council and does not discuss the possibility of authorizations by the General Assembly or action by states or regional organizations outside the U.N. framework.<sup>35</sup> The report develops criteria for the legitimacy of the use of force similar to those suggested by the ICISS, but limits the application of these criteria to the use of force authorized by the Security Council.<sup>36</sup> While the High-Level Panel Report supports the conceptual change in the understanding of sovereignty as responsibility and the emphasis that the responsibility for the well-being of human beings is shared between the state and the international community, the operational content of the responsibility to protect is remarkably more restrictive.

### C. *The Report of the Secretary-General In Larger Freedom (2005)*

In his 2005 report, *In Larger Freedom*, the Secretary-General states that the responsibility to protect should be embraced and, when necessary, acted upon.<sup>37</sup> In contrast to the High-Level Panel, which discusses the responsibility to protect in the context of the use of force, the Secretary-General returns to the broader understanding of the ICISS Report by placing his assessment of the responsibility to protect in context with the principles of human dignity and the rule of law. With regard to the use of force, the Secretary-General also focuses on the Security Council and does not discuss the possibility of humanitarian interventions without authorization of the Council<sup>38</sup>: “The task is not to find alternatives to the Security Council as a source of authority but to make it work better.”<sup>39</sup> He also endorses the criteria for the legitimate use of force as developed by the High-Level Panel and urges the Security Council to adopt them.<sup>40</sup>

### D. *The 2005 World Summit Outcome*

Until 2005, the responsibility to protect had only been considered by the Secretary-General and specialized commissions. This changed at the September 2005 World Summit, when the heads of state and government convening at the U.N. General Assembly endorsed the responsibility to

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33. *Id.* ¶ 203.

34. *Id.* ¶ 208.

35. See Stahn, *supra* note 11, at 105-06.

36. *High-Level Panel Report*, *supra* note 30, ¶ 207.

37. The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Toward Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*].

38. *Id.* ¶¶ 125-126.

39. *Id.* ¶ 126.

40. *Id.*

protect.<sup>41</sup> The state representatives explicitly acknowledged that each state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and pledged to act in accordance with it.<sup>42</sup> They emphasized that the international community should not only help states to exercise their responsibility but that the international community has a responsibility of its own to help protect populations.<sup>43</sup> This responsibility has to be exercised in accordance with Chapters VI and VIII of the U.N. Charter, and where necessary, collective action through the Security Council under Chapter VII of the U.N. Charter should be taken.<sup>44</sup> The Outcome Document stresses the need for the General Assembly to continue consideration of the responsibility to protect, bearing in mind the principles of the U.N. Charter as well as those of international law.<sup>45</sup>

The World Summit Outcome Document acknowledges the concept of the responsibility to protect but demonstrates significant restraint with regard to the responsibility of the international community. While the ICISS Report applied to "large scale loss of life," or "large scale 'ethnic cleansing,'"<sup>46</sup> the Outcome Document limits the scope of the responsibility to protect to the international crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>47</sup> The significance the ICISS Report attributed to prevention is hardly noticeable in the Outcome Document. Furthermore, it explicitly recognizes a collective responsibility only concerning diplomatic, humanitarian and other peaceful means. With regard to collective action under Chapter VII of the U.N. Charter, the heads of state and government more vaguely state that they are prepared to act in a timely manner and on the basis of a case-by-case evaluation. They neither explicitly recognize specific responsibilities of the Security Council, nor mention the possibility of unilateral or collective action with the authorization of the General Assembly or outside of the U.N. framework. The idea of criteria for an authorization of the use of force was also dropped.

#### E. *Subsequent Endorsement and Criticism of the Responsibility To Protect*

Following the World Summit, the concept of the responsibility to protect entered into discussions and statements of organs of the United Nations, regional organizations, and representatives of states. Single states have mentioned the concept in the deliberations of the Security Council since

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41. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter World Summit Outcome Document]. For an overview of the different positions held by states with regard to the responsibility to protect, see Carlo Focarelli, *The Responsibility To Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13 J. CONFLICT & SECURITY L. 191, 201-05 (2008).

42. World Summit Outcome Document, *supra* note 41, ¶ 138.

43. *Id.* ¶¶ 138-139.

44. *Id.* ¶ 139.

45. *Id.*

46. ICISS REPORT, *supra* note 2, ¶ 4.19.

47. World Summit Outcome Document, *supra* note 41, ¶¶ 138-139.



2002,<sup>48</sup> and in 2004, the representative of the Philippines made reference to it in the context of a resolution dealing with Darfur.<sup>49</sup> The first explicit acknowledgement in a resolution occurred in 2006, when the Security Council referred to the relevant paragraphs of the World Summit Outcome Document and explicitly reaffirmed the responsibility to protect with regard to the protection of civilians in armed conflict.<sup>50</sup> The Security Council also acknowledged the concept with regard to the situation in Darfur.<sup>51</sup> Moreover, a High-Level Mission appointed by the Human Rights Council to assess the human rights situation in Darfur assumed that Sudan, as well as the international community, had the obligation to exercise their responsibility to protect the people of Darfur.<sup>52</sup>

However, an episode during the budgetary deliberations of the 62nd General Assembly in 2007 and 2008 showed that not all states approve the concept unconditionally. In an effort to facilitate the development of the responsibility to protect and to complement the work of the Special Adviser on the Prevention of Genocide and Mass Atrocities, Secretary-General Ban Ki-moon decided in 2007 to appoint a Special Adviser on the Responsibility To Protect and presented this decision to the President of the Security Council<sup>53</sup> and to the Fifth Committee of the General Assembly.<sup>54</sup> A number of delegations expressed their disapproval of this appointment, indicating that it was for the General Assembly to decide on the establishment of new posts.<sup>55</sup> This criticism was clearly aimed at the attempt to embed the responsibility to protect in the institutional framework of the United Nations without prior consultation of the General Assembly. It was not until February 2008 that the Secretary-General could appoint Edward Luck as Special Adviser.<sup>56</sup> Even then, the term responsibility to protect vanished from the post description—the special adviser’s work will only “include” the responsibility to protect<sup>57</sup>—and protests from Cuba, Sudan, Egypt, Bangladesh, Iran, Venezuela, and

48. See, e.g., U.N. SCOR, 57th Sess., 4660th mtg. at 11, U.N. Doc. S/PV.4660 (Resumption 1) (Dec. 10, 2002) (statement of Canada); see also U.N. SCOR, 57th Sess., 4660th mtg. at 9, U.N. Doc. S/PV.4660 (Dec. 10, 2002) (statement of Norway).

49. U.N. SCOR, 59th Sess., 5015th mtg. at 10-11, U.N. Doc. S/PV.5015 (July 30, 2004) (statement of the Philippines); see also S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

50. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); see also S.C. Res. 1894, pmbl., U.N. Doc. S/RES/1894 (Nov. 11, 2009).

51. S.C. Res. 1706, pmbl., U.N. Doc. S/RES/1706 (Aug. 31, 2006).

52. U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council:” Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101*, U.N. Doc. A/HRC/4/80 (Mar. 9, 2007).

53. Letter from Ban Ki-moon, U.N. Sec’y-Gen., to President of the U.N. Sec. Council, U.N. Doc. S/2007/721 (Dec. 7, 2007).

54. The Secretary-General, *Report of the Secretary-General, Estimates in Respect of Special Political Missions, Good Offices, and Other Political Initiatives Authorized by the General Assembly and/or the Security Council*, ¶ 31, U.N. Doc. A/62/512/Add.1 (Oct. 30, 2007).

55. Their disapproval was supported by the Advisory Committee on Administrative and Budgetary Questions, which noted that the establishment of this position was a policy matter and should therefore be decided by the General Assembly. See General Assembly, *Thirtieth Report of the Advisory Committee on Administrative and Budgetary Questions on the Proposed Programme Budget for the Biennium 2008-2009*, ¶ 15, U.N. Doc. A/62/7/Add.29 (Dec. 14, 2007).

56. Press Release, Sec’y-Gen., Secretary-General Appoints Edward C. Luck of United States Special Adviser, U.N. Doc. SG/A/1120 (Feb. 21, 2008).

57. *Id.*

Nicaragua continued in the Fifth Committee.<sup>58</sup>

F. *The Report of the Secretary-General on Implementing the Responsibility To Protect (2009)*

Nevertheless, the Secretary-General issued a report, *Implementing the Responsibility To Protect*, in 2009.<sup>59</sup> Based on paragraphs 138 and 139 of the World Summit Outcome Document, the Secretary-General emphasizes that the concept of the responsibility to protect has received the consensus of all world leaders.<sup>60</sup> He underlines that the concept not only represents a Western approach but builds upon a global consensus with, for example, African states taking a leading role.<sup>61</sup> With regard to the operationalization of the responsibility to protect, the report suggests a three-pillar approach.<sup>62</sup> The first pillar consists of the responsibility of the state to protect its population from serious crimes.<sup>63</sup> The second pillar is the commitment of the international community—consisting of states, regional organizations, civil society, and the private sector—to support the state in complying with its obligations under the first pillar.<sup>64</sup> The third pillar comprises the timely and decisive response by the international community should a state not live up to its responsibility to protect.<sup>65</sup> In the last situation, members of the international community should resort to peaceful measures and, as a last resort, to coercive action in compliance with the U.N. Charter. The report amplifies in further detail the content of the three pillars, makes specific recommendations with regard to how states and other international actors should assume their respective responsibilities under the three-pillar approach, and asks the General Assembly to consider its further policy with regard to implementing the responsibility to protect.<sup>66</sup>

G. *The Responsibility To Protect and the 63rd Session of the General Assembly*

Preceding the opening of the 63rd General Assembly in 2009, the President of the General Assembly circulated a Concept Note, in which he emphasized that the responsibility to protect does not entail any legal commitment but that it is for the General Assembly to develop and elaborate such a legal basis.<sup>67</sup> He further highlighted the meaning and significance of

58. See Press Release, Gen. Assembly, Budget Committee Takes Up Report of Joint Inspection Unit as It Begins Resumed Session, U.N. Doc. GA/AB/3836 (Mar. 3, 2008).

59. The Secretary-General, *Report of the Secretary-General, Implementing the Responsibility To Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility To Protect*].

60. *Id.* ¶¶ 3-4.

61. *Id.* ¶ 8.

62. *Id.* ¶ 11.

63. *Id.* ¶¶ 13-27.

64. *Id.* ¶¶ 28-48.

65. *Id.* ¶¶ 49-66.

66. *Id.* ¶¶ 69-71.

67. Letter and Concept Note from Office of the President, U.N. Gen. Assembly, to Permanent Missions and Permanent Observer Missions to the United Nations (July 17, 2009), available at <http://www.un.org/ga/president/63/letters/ResponsibilitytoProtect170709.pdf>.

state sovereignty and pointed out that the use of force may only be authorized by the Security Council against an immediate threat to international peace and security. According to the President of the General Assembly, collective security may not be regarded as an enforcement mechanism for international human rights law and international humanitarian law.<sup>68</sup>

In the General Assembly's debate on the responsibility to protect, ninety-four member states submitted statements. The debate showed a broad consensus with regard to the concept of the responsibility to protect as it was recognized at the World Summit in 2005.<sup>69</sup> The General Assembly almost unanimously highlighted the importance of prevention of serious crimes and the responsibility of the international community to support states in the effort to prevent or confine such crimes.<sup>70</sup> Most states also welcomed the report of the Secretary-General, and some delegates explicitly endorsed his three-pillar approach.<sup>71</sup>

A number of states, however, voiced serious concerns. Some emphasized the concept's potential for abuse as a pretext for unilateral intervention and equated the responsibility to protect with humanitarian intervention.<sup>72</sup> Many states identified the composition of the Security Council and the veto power of the permanent members as the major obstacles for decisive and effective U.N. action.<sup>73</sup> These states called for reform, looking for ways to limit the use of the veto.<sup>74</sup> Many states expressed a preference for the General Assembly over the Security Council with regard to the implementation of the responsibility to protect.<sup>75</sup>

Eventually, the General Assembly adopted a resolution, which reaffirms the principles and purposes of the U.N. Charter as well as the commitment to the responsibility to protect in the World Summit Outcome Document in its preamble.<sup>76</sup> In its operational paragraphs, the resolution "takes note" of the Secretary-General's report—the initial proposal to "take note with appreciation" did not find a consensus—and the General Assembly decides to continue its consideration of the responsibility to protect.<sup>77</sup> In his opening statement to the 64th Session of the General Assembly, Secretary-General Ki-

68. *Id.* at 2.

69. See GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT: THE 2009 GENERAL ASSEMBLY DEBATE: AN ASSESSMENT 1 (2009), [http://globalr2p.org/media/pdf/GCR2P\\_General\\_Assembly\\_Debate\\_Assessment.pdf](http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf); INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, REPORT ON THE GENERAL ASSEMBLY PLENARY DEBATE ON THE RESPONSIBILITY TO PROTECT 1 (2009), [http://www.responsibilitytoprotect.org/ICRtoP%20Report-General\\_Assembly\\_Debate\\_on\\_the\\_Responsibility\\_to\\_Protect%20FINAL%202009\\_22\\_09.pdf](http://www.responsibilitytoprotect.org/ICRtoP%20Report-General_Assembly_Debate_on_the_Responsibility_to_Protect%20FINAL%202009_22_09.pdf).

70. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 2, 6; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 5.

71. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 5; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 4-5.

72. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 7; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 7.

73. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 6; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 6.

74. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 6; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 6.

75. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 7-8; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 6.

76. G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

77. *Id.*

moon concluded that the General Assembly had reaffirmed the responsibility to protect.<sup>78</sup>

#### H. Conclusion

Since its introduction in 2001, the concept of the responsibility to protect has shaped international discourse on the prevention and containment of the most serious crimes. The concept has found tremendous resonance among states, international and regional organizations, as well as nonstate actors. The international consensus extends to the general idea that it is the shared responsibility of the state as well as of the international community to prevent and contain genocide and other massive human rights violations.<sup>79</sup> However, a *tour d'horizon* of the development of the concept shows that significantly different understandings of the responsibility to protect exist. The details of the concept, as developed by the ICISS in 2001, differ remarkably from the 2004 High-Level Panel Report, which was endorsed in principle by Secretary-General Annan in 2005. The 2005 World Summit Outcome Document reflects an even narrower consensus. While the concept is widely accepted, single implications which are associated with it are not. The uproar in the Fifth Committee of the General Assembly caused by Secretary-General Ki-moon's attempt to install a special representative on the responsibility to protect shows how controversial the concept is. And although state representatives and international organizations permanently endorse the concept, single states and groups of states continue to emphasize the impermeability of state sovereignty with regard to the domestic affairs of a state, to point out the limited competences of the Security Council, and to emphasize that the responsibility to protect has not yet gained legal force.

Against this background, the question arises whether the responsibility to protect constitutes only a conceptual framework for political discourse or whether it has legal implications. This question requires a closer examination of the concept of the responsibility to protect in the light of the process of international lawmaking.

### III. THE PROCESS OF INTERNATIONAL LAWMAKING AND THE LEGAL STATUS OF THE RESPONSIBILITY TO PROTECT

The rise of the responsibility to protect as a widely acknowledged and much discussed concept of international politics raises the question of its status under international law. Can the responsibility to protect be regarded as customary international law? Is it becoming a customary norm? Does it reflect a conceptual change in the understanding of sovereignty that by itself entails legally significant changes? The responsibility to protect has already been characterized as an emerging principle of customary international law

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78. Sec'y-Gen. Ban Ki-moon, United Nations, Opening Address at the General Debate of the 64th Session of the General Assembly: Now Is Our Time (Sept. 23, 2009), *available at* [http://www.un.org/ga/64/generaldebate/pdf/sgopen\\_en.pdf](http://www.un.org/ga/64/generaldebate/pdf/sgopen_en.pdf).

79. See, e.g., Stahn, *supra* note 11, at 118.

in the ICISS Report.<sup>80</sup> Similarly, the High-Level Panel Report speaks of an “emerging norm,”<sup>81</sup> an assessment shared by the Secretary-General.<sup>82</sup> The World Summit Outcome Document, on the other hand, is silent as to the legal status of the responsibility to protect. Nevertheless, most scholars qualify it as a norm<sup>83</sup> which might become customary international law.<sup>84</sup> Other authors describe it as “soft law,”<sup>85</sup> or as a norm becoming a legal principle, without further specifying how this might occur.<sup>86</sup>

In the following Sections, I will show that the responsibility to protect cannot be understood as a norm or even as a potential norm under customary international law. I argue that it is futile to ask whether the responsibility to protect has become or can become a binding norm, but that it is much more useful to focus on existing norms of international law and to examine how the development of the concept of the responsibility to protect and the reactions of the relevant international actors to this development have shaped, and might in the future shape, the international legal order.

#### A. *Responsibility To Protect as an Emerging Norm of Customary International Law?*

##### 1. *The Ambiguity of the Concept*

The first obstacle in characterizing the responsibility to protect as an emerging norm lies in the ambiguity of the concept. The concept has not only changed remarkably throughout its development, but it is also ambiguous in that it incorporates a variety of notions into one concept. As it was developed by the ICISS, it refers to a change in terminology, it comprises a conceptual change with regard to the principle of sovereignty, it is understood as a guiding principle for international politics, and it tries to establish criteria and operational principles for intervention. Furthermore, some aspects of the

80. ICISS REPORT, *supra* note 2, ¶¶ 2.24, 6.17.

81. *High-Level Panel Report*, *supra* note 30, ¶ 203.

82. *In Larger Freedom*, *supra* note 37, ¶ 135.

83. The term ‘norm’ is, however, not always used in a legal sense but also in a broader way in the political science literature. See, e.g., BELLAMY, *supra* note 9, at 4–7; Ramesh Thakur & Thomas G. Weiss, *R2P: From Idea to Norm—and Action?*, 1 GLOBAL RESP. TO PROTECT 22, 23 (2009).

84. See Brian Barbour & Brian Gorlick, *Embracing the ‘Responsibility To Protect’: A Repertoire of Measures Including Asylum for Potential Victims*, 20 INT’L J. REFUGEE L. 533, 535 (2008); Gareth Evans, *From Humanitarian Intervention to the Responsibility To Protect*, 24 WIS. INT’L L.J. 703, 704 (2006); S. Neil MacFarlane, Carolin J. Thielking & Thomas G. Weiss, *The Responsibility To Protect: Is Anyone Interested in Humanitarian Intervention?*, 25 THIRD WORLD Q. 977, 988 (2004); Ingo Winkelmann, *Responsibility To Protect*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 22 (Rüdiger Wolfrum ed., 2010), <http://www.mpepil.com>; see also CHRISTOPHER VERLAGE, RESPONSIBILITY TO PROTECT 171 (2009) (arguing that the responsibility to protect has already gained the status of customary international law).

85. Jennifer M. Welsh, *The Responsibility To Protect: Securing the Individual in International Society?*, in FROM RIGHTS TO RESPONSIBILITIES, RETHINKING INTERVENTIONS FOR HUMANITARIAN PURPOSES 23, 43 (Oliver Jütersonke & Keith Krause eds., 2006).

86. Alicia L. Bannon, *The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157, 1158 (2006) (speaking of the development of a new international norm); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 524 (2009) (speaking of an ongoing process of crystallization into hard international law); David Scheffer, *Atrocity Crimes Framing the Responsibility To Protect*, 40 CASE W. RES. J. INT’L L. 111, 115 (2007–2008) (speaking of an emerging norm).

responsibility to protect are formulated in terms which more strongly imply an obligation, while other components enumerate potential measures or urge actors to conduct themselves in a specific manner. The concept incorporates and combines legal, political and moral language. These different notions cannot be encompassed by a single legal norm. Even considering the potential diversity in the structure and concreteness of norms—with some legal norms being more open-textured than others<sup>87</sup> and some legal norms being principles rather than rules<sup>88</sup>—the responsibility to protect is not a suitable candidate for a norm. Not all aspects of the concept are fit to be translated into legal rights and obligations. The responsibility to protect is constructed as a comprehensive framework for the prevention and containment of massive human rights violations. As such it cannot in its entirety become a legal norm. Single elements of the concept possibly could be translated into single rights and duties. But that does not make the concept as such a suitable candidate for a legal norm.

## 2. *Responsibility as a Legal Concept*

Even if one considers a narrower approach to the responsibility to protect and focuses on the specific responsibilities of a state as well as of the international community to prevent, to react, and to rebuild, these notions cannot, without difficulty, be translated into a legal norm in an intelligible way. From a legal perspective it is not clear how the term responsibility fits into jurisprudential categories. At least in technical legal terms, a responsibility cannot be equated with a duty.<sup>89</sup> The existence and violation of a duty can be one possible ground for the responsibility of a person or a legal entity.<sup>90</sup> Duty and responsibility must generally be understood as two distinct legal concepts.

However, this does not mean that the concept of a responsibility cannot have normative content. In the context of international law, “responsibility” is primarily used to classify the consequences flowing from the breach of an international obligation. A breach of an international obligation that is attributable to a state constitutes an internationally wrongful act and entails the international responsibility of that state.<sup>91</sup> The international responsibility then triggers the secondary obligations of the state, such as the duty to cease a continuing breach or to make reparations.<sup>92</sup> The responsibility to protect does not refer to this concept of state responsibility.

87. H.L.A. HART, *THE CONCEPT OF LAW* 124 (2d ed. 1994).

88. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 22-28 (1977).

89. See W. Michael Reisman, *Report, Tenth Commission: Present Problems of the Use of Armed Force in International Law, Sub-group on Humanitarian Intervention*, 72 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 237, 244 (2007) (arguing that the responsibility to protect should not be equated with a duty to protect); David Rodin, *The Responsibility To Protect and the Logic of Rights*, in *FROM RIGHTS TO RESPONSIBILITIES*, *supra* note 85, at 45, 57-58 (arguing that a responsibility can, but does not necessarily have to, encompass a duty).

90. See Christopher Kutz, *Responsibility*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 548, 550 (Jules Coleman & Scott Shapiro eds., 2002).

91. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex arts. 1-2, U.N. Doc. A/Res/56/83, (Jan. 28, 2002).

92. *Id.* Annex arts. 28-39.

The term “responsibility” is not only used in this technical sense but also in a more general way as a synonym for obligation. When the International Court of Justice in the *Barcelona Traction* decision states that “responsibility is the necessary corollary of a right,”<sup>93</sup> it uses the term as a synonym for obligation. In other parts of the judgment, however, the court understands responsibility in the technical sense as it is employed in the state responsibility regime.<sup>94</sup> This ambiguous usage might lead to the presumption that the responsibility to protect can be equated with an obligation, or a duty to protect.<sup>95</sup> However, such an approach would neglect the proponents’ deliberate avoidance of framing the concept in terms of a legal obligation. Otherwise one would have expected them to apply the technical legal term. The significance of this terminology is highlighted by the fact that the United States refused to accept then-Secretary-General Kofi Annan’s proposal to codify the international community’s “obligation” in the World Summit Outcome Document, insisting instead on keeping the weaker term “responsibility.”<sup>96</sup>

In a different context, the term responsibility is used to refer to a set of competences and duties. Article 24(1) of the U.N. Charter, for example, vests in the Security Council the primary responsibility for maintaining international peace and security.<sup>97</sup> Article 13(2) of the U.N. Charter mentions responsibilities of the General Assembly.<sup>98</sup> In both cases the establishment of such a responsibility does not by itself enlarge the scope of rights or duties of those organs. Rather, it refers to other competences enumerated in different chapters of the U.N. Charter.<sup>99</sup>

Theoretically, one could argue that the responsibility to protect as a norm stipulates—in very broad and vague terms—the obligation of the international community to act when serious human rights violations occur. However, such an isolated norm of customary international law would hardly encompass substantial normative content. It is only in conjunction with other, more concrete rights or duties that such a broad norm could gain legal significance.

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93. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Second Phase, 1970 I.C.J. 3, 33 (Feb. 5).

94. *Id.* at 17, 30, 36, 48, 51.

95. See, e.g., Bannon, *supra* note 86, at 1162; Jutta Brunnée & Stephen Troope, *Norms, Institutions and UN Reform: The Responsibility To Protect*, 2 J. INT’L L. & INT’L REL. 121, 123 (2005); Peter Hilpold, *The Duty To Protect and the Reform of the United Nations—A New Step in the Development of International Law?*, 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 35, 50 (2006); Peters, *supra* note 86, at 539.

96. See Alex J. Bellamy, *Whither the Responsibility To Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT’L AFF. 143, 165-66 (2006).

97. “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” U.N. Charter art. 24, para. 1.

98. “The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.” U.N. Charter art. 13, para. 2.

99. Tobias Stoll, *Responsibility, Sovereignty and Cooperation—Reflections on the “Responsibility To Protect,”* in INTERNATIONAL LAW TODAY: NEW CHALLENGES AND THE NEED FOR REFORM? 1, 8-9 (Doris König et al. eds., 2008).

### 3. *Lack of State Practice and Opinio Juris*

An additional problem in characterizing the responsibility to protect as an emerging norm of customary international law arises with regard to the constitutive elements of customary international law. Customary international law—at least in its traditional understanding as codified in Article 38(1)(b) of the Statute of the International Court of Justice—requires a repeated conduct of states that amounts to state practice and a corresponding belief that this conduct is required by law (*opinio juris*).<sup>100</sup> Notwithstanding the general difficulty of identifying these elements, it is particularly problematic to recognize them in the context of the responsibility to protect. One can attempt to identify the emergence of a customary norm by looking to the statements of states or to their assent or acquiescence to the endorsement of the concept within the U.N. framework. Verbal utterances<sup>101</sup> as well as resolutions of international organizations and statements of states within international organizations can be regarded as evidence of state practice and *opinio juris*.<sup>102</sup> However, taking into account the before mentioned ambiguity of the concept, it is difficult to determine to which part or version of the responsibility to protect a specific statement alludes. Since the concept has undergone a number of substantive changes during its development, it is far from clear what exactly a state means when it endorses “the” responsibility to protect.

The same difficulties apply with regard to a second potential point of departure for the emergence of customary international law, the actual practice of states and other international actors. Since the concept of the responsibility to protect encompasses a variety of possible reactions to a deteriorating human rights situation in a specific state, it is relatively easy to allege a connection between a reaction of a state or international organization in a specific case and the concept of the responsibility to protect. The Security Council’s resolutions with regard to Darfur, for example, have been qualified as implementing the responsibility to protect.<sup>103</sup> It is, however, far from clear why the mere mention of the concept in the preamble of a resolution should imply that the Security Council acts in implementing the responsibility to protect.<sup>104</sup> Which part of the concept would the Security Council have endorsed? To what extent did it influence or determine the decision-making process? If the Security Council did act under the impression of the responsibility to protect, did it only implement its own responsibility or the

100. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27); *North Sea Continental Shelf* (F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

101. Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 84, ¶ 10.

102. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 255 (July 8); *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at 99; *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1974 I.C.J. 175, 195 (July 25).

103. See, e.g., Max W. Matthews, *Tracking the Emergence of a New International Norm: The Responsibility To Protect and the Crisis in Darfur*, 31 B.C. INT’L & COMP. L. REV. 137, 148-50 (2008); Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility To Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 374 (2007).

104. In Resolution 1706, the Security Council recalled Resolution 1674 (2006), which reaffirmed the endorsement of the responsibility to protect in the World Summit Outcome Document. S.C. Res. 1706, pmbl., U.N. Doc. S/RES/1706 (Aug. 31, 2006).



concept as a whole? There are no indications that the Security Council acted in the belief that it was obliged to take a specific action due to its previous endorsement of the responsibility to protect.

It is even more problematic to construct such an endorsement when states or other international actors act without specific reference to the concept. When a state resorts to sanctions against another state as a response to human rights violations in that state, that does not necessarily mean that it executes its responsibility to react or that it acts under the impression that it is obliged to act due to the responsibility to protect. To interpret every action that is mentioned within the concept of the responsibility to protect as a possible measure and to attribute *opinio juris* to an actor due to the mere mention of the concept seems arbitrary and unconvincing. Even the Security Council's explicit reference to the responsibility to protect represents, at most, a consensus with regard to the concept, and not with regard to specific consequences that flow from the concept.<sup>105</sup>

#### 4. *Embedding the Responsibility To Protect in the Existing Legal Framework*

Finally, construing the responsibility to protect as an emerging norm is problematic, as the responsibility was developed not within a normative vacuum but within a complex existing legal framework. The concept touches upon a number of existing legal norms. For example, the power of the Security Council to act under Article 39 and Chapter VII of the U.N. Charter in instances of massive human rights violations is already well-established in the international legal order.<sup>106</sup> This power is an essential component of the responsibility to protect. To deem the responsibility to protect an emerging legal norm is therefore to indicate that this authority of the Security Council is similarly only an emerging norm, and not yet part of international law.<sup>107</sup>

#### B. *Sovereignty as Responsibility?*

If the responsibility to protect cannot be regarded as a norm of customary international law, the question arises whether the conceptual change in the understanding of the principle of sovereignty might have any direct legal implications. At the core of the responsibility to protect lies the assumption that sovereignty does not only constitute a right of a state against intervention from other states but also encompasses a state's responsibility to protect the people under its control. Some authors seem to attribute an immediate legal impact to this conceptual change in the principle of responsibility. Ved Nanda, for example, argues that a government can no longer "hide behind the shield of sovereignty, claiming non-intervention by other states in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights."<sup>108</sup> States that fail to

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105. Focarelli, *supra* note 41, at 205.

106. *See infra* Section IV.B.

107. Reisman, *supra* note 89, at 243.

108. Nanda, *supra* note 103, at 373.

protect their populations against serious crimes are viewed as having effectively waived their national sovereignty and therefore may not invoke sovereignty against intervention.<sup>109</sup> Since the prohibition of the use of force and the nonintervention principle are understood as corollaries to state sovereignty, the conceptual change in the understanding of state sovereignty is believed to have an immediate impact on the interpretation of these norms.<sup>110</sup>

This approach is flawed for two reasons. First, sovereignty as responsibility is not a new concept.<sup>111</sup> While state sovereignty has, in its external dimension,<sup>112</sup> traditionally been understood as independence—most prominently formulated by Max Huber in his role as arbitrator in the *Island of Palmas* case<sup>113</sup>—it was never meant to encompass an absolute freedom of the state. As a norm of international law, sovereignty has always been understood to encompass legal obligations.<sup>114</sup> The 1970 Friendly Relations Declaration of the General Assembly, for example, explicitly acknowledges the connectivity between sovereignty and obligations under international law when it lists as elements of sovereign equality not only certain rights of states but also their duty to respect the personality of other states as well as to comply fully and in good faith with their international obligations.<sup>115</sup>

Second, it is not possible to derive concrete legal conclusions from the changing concept of state sovereignty.<sup>116</sup> As codified in Article 2(1) of the U.N. Charter, sovereignty is a legal norm.<sup>117</sup> At the same time, legal norms and principles that are often seen in context with sovereignty—such as nonintervention, territorial integrity, or legal capacity—have a legal existence of their own, as independent legal norms.<sup>118</sup> A conceptual change in the principle of sovereignty can therefore only have a limited impact on the

109. David Aronofsky, *The International Legal Responsibility To Protect Against Genocide, War Crimes and Crimes Against Humanity: Why National Sovereignty Does Not Preclude Its Exercise*, 13 ILSA J. INT'L & COMP. L. 317, 318 (2007); Christopher C. Joyner, "The Responsibility To Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT'L L. 693, 718-20 (2007).

110. Kithure Kindiki, *International Law on Trial: The Darfur Crisis and the Responsibility To Protect Civilians*, 9 INT'L COMMUNITY L. REV. 445, 458 (2007).

111. *Implementing the Responsibility To Protect*, *supra* note 59, ¶ 11; BELLAMY, *supra* note 9, at 33; Focarelli, *supra* note 41, at 194; Thakur & Weiss, *supra* note 83, at 26-29.

112. On the internal and external dimensions of sovereignty, see Bardo Fassbender & Albert Bleckmann, *Article 2(1)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 68, 70-71 (Bruno Simma ed., 2d ed. 2002). *See also* Peters, *supra* note 86, at 517 (arguing that the responsibility to protect "infuses external sovereignty with elements of internal sovereignty").

113. *Island of Palmas (Neth. v. U.S.)*, 2 R. Int'l Arb. Awards 829, 838 (Perm. Ct. Arb. 1928) ("Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.").

114. *See* Juliane Kokott, *States, Sovereign Equality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 84, ¶¶ 28-29.

115. Friendly Relations Declaration, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/8082 (Oct. 24, 1970); *see* Stahn, *supra* note 11, at 111-14; *see also* FRANZ XAVER PERREZ, COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW 331-43 (2000); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2045 (2003).

116. Focarelli, *supra* note 41, at 194-95.

117. "The Organization is based on the principle of the sovereign equality of all its Members." U.N. Charter art. 2, para 1.

118. Peters, *supra* note 86, at 530 (arguing that sovereignty is conditional upon the fulfillment of the responsibility to protect, but acknowledging that nonintervention has an "independent standing").

context of these norms.

Sovereignty is also a structural paradigm of the international legal system.<sup>119</sup> In this rather descriptive dimension sovereignty does not have any direct legal implications. Within the framework of the responsibility to protect, the notion that sovereignty encompasses the responsibility of the state applies rather to the second, conceptual dimension of the principle of sovereignty. The ICISS Report—although it also refers to Article 2(1) of the U.N. Charter—speaks of sovereignty as a functional principle of international relations<sup>120</sup> which had to be recharacterized.<sup>121</sup> The ICISS undertakes this conceptual redefinition in order to reconcile the tension between sovereignty and human rights. The ICISS Report comprises concrete proposals for changes in the international framework for the prevention and containment of human rights violations, but it has no bearing on the content of sovereignty as a legal principle.

### C. *The Reality and Dynamics of the International Lawmaking Process*

If the responsibility to protect cannot be regarded as an emerging norm of customary international law, and if the conceptual shift in the understanding of sovereignty as encompassing responsibilities does not, by itself, entail any changes in the international legal order, the question arises of how the responsibility to protect can have legal significance. Since the concept itself cannot be understood as an existing or emerging legal norm, one has to examine whether the rise of the concept and its endorsement by international legal actors might have had a legal influence on existing norms, such as the prohibition of the use of force or the system of collective security under the U.N. Charter. Before the status of these legal norms can be examined in light of the responsibility to protect,<sup>122</sup> a preliminary inquiry into the sources of international law and into the process of international lawmaking is required.

#### 1. *The Formal Sources of International Law*

To identify norms of international law, international practitioners and scholars regularly focus on the traditional sources as they are enumerated in Article 38(1) of the Statute of the International Court of Justice: international treaties, customary international law, and general principles of law.<sup>123</sup> New sources—such as legally binding resolutions and decisions adopted by organs of international organizations—are only reluctantly admitted into the canon of international law.<sup>124</sup> Based upon this formal approach to the sources of

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119. CASSESE, *supra* note 1, at 48 (noting sovereignty as “the fundamental premise on which all international relations rest”).

120. ICISS REPORT, *supra* note 2, ¶ 1.32.

121. *Id.* ¶ 2.14.

122. *See infra* Part IV.

123. MALCOLM N. SHAW, INTERNATIONAL LAW 70-71 (6th ed. 2008).

124. *See, e.g.*, PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 52-53 (7th ed. 1997) (analyzing whether and under which circumstances acts of international organizations can be recognized as a separate source of law).

international law, the endorsement of the responsibility to protect alone should not carry any legal significance. No international agreement has been concluded. The concept does not mirror a general principle. And since states have not yet established a general "settled practice" accompanied by "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it,"<sup>125</sup> it has not gained the status of customary international law. The reports of the ICISS, the High-Level Panel, and the Secretary-General are not formal sources of international law. Since resolutions of the General Assembly are not legally binding under international law,<sup>126</sup> neither is the declaration of the World Summit. And although resolutions of the Security Council may be binding according to Article 25 of the U.N. Charter, the mere mention of the concept in the preamble of a Security Council resolution does not cloak the whole concept or even parts of it with binding force under international law. The concept of the responsibility to protect has been endorsed by nongovernmental organizations (NGOs), international commissions, organs of international organizations, and by single states and groups of states. However, none of these statements constitute a formal source of international law.

To confine oneself to this traditional understanding of the formal sources of international law would, however, amount to a misconception of the reality and the dynamics of the international lawmaking process. The International Court of Justice has already, at an early stage of its activity, indicated that it does not limit itself to these sources. In the *Corfu Channel* case, the court derived a legal obligation of the Albanian authorities to warn British ships of a minefield from "elementary considerations of humanity."<sup>127</sup> In its advisory opinion regarding the admissibility of Reservations to the Genocide Convention, the ICJ acknowledged that the underlying principles of the Genocide Convention are "binding on States, even without any conventional obligation."<sup>128</sup> And in the *Bernadotte* case, the court held that international law gave the founding members of the United Nations the power to establish a legal entity with objective international personality, without further elaborating on which rule of international law it based this assertion.<sup>129</sup>

## 2. *The Emergence of Customary International Law as a Normative Process*

More important than these occasional escapes from the restraints of the formal sources, however, is the methodology by which international institutions, actors, and scholars identify and apply international law. The conceptual construction of the formal sources of law intrinsically asks for an

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125. *North Sea Continental Shelf* (F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

126. Kay Hailbronner & Eckart Klein, *Article 10*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 112, at 257, 268-73; Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 262-63 (1994).

127. *Corfu Channel Case*, 1949 I.C.J. 4, 22 (Apr. 9).

128. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

129. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11).

empirical approach. In identifying treaty obligations, the jurist is expected to look for agreements between international actors. In identifying customary international law, one should locate the practice of state actors and examine whether their practice is accompanied by a corresponding *opinio juris*.<sup>130</sup> And the identification of general principles of law demands a comparative inquiry into the domestic legal systems of the community of states.<sup>131</sup> The reality of international law, however, only remotely resembles such an approach.

In particular, the process of identifying customary international law is far from an empirical method and can best be described as a normative, value-oriented procedure.<sup>132</sup> International practice has incrementally softened the two constitutive elements of customary international law, general practice of states and *opinio juris*. While the International Law Commission, at the beginning of its work, demanded state practice "over a considerable period of time" for a customary norm to emerge,<sup>133</sup> the ICJ did not find "the passage of only a short period of time" to be "a bar to the formation of a new rule of customary international law" as long as state practice was "both extensive and virtually uniform."<sup>134</sup> Subsequently, the court even gave up this latter restriction when it held in the *Nicaragua* case that practice did not have to be in absolutely rigorous conformity, but that it was sufficient that the conduct of states was in general consistent.<sup>135</sup> According to some authors, the practice of only a few or even one state may be sufficient,<sup>136</sup> and even a single action may create customary international law.<sup>137</sup> Moreover, when the ICJ identifies norms of customary international law, it relies heavily on the voting behavior of states within international organizations as well as directly on decisions and resolutions of international organizations.<sup>138</sup>

The identification of a norm of customary international law is therefore a highly subjective and often result-oriented process.<sup>139</sup> In that process, international jurists do not allot much significance to the actual practice of states but pay much more attention to statements made by states—in particular

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130. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27); *North Sea Continental Shelf* (F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

131. MALANCZUK, *supra* note 124, at 49.

132. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 453 (2000).

133. See *Working Paper by Special Rapporteur Manley O. Hudson on Article 24 of the Statute of the International Law Commission*, [1950] 2 Y.B. Int'l L. Comm'n 24, 26, U.N. Doc. A/CN.4/16.

134. *North Sea Continental Shelf* (F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

135. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

136. ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 42 (1971); KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 59 (2d ed. 1993).

137. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 13 (1977); Karl Strupp, *Les règles générales du droit de la paix*, 47 RECUEIL DES COURS 257, 304-05 (1934).

138. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 255 (July 8); 1986 I.C.J. at 14, 99-100; *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1974 I.C.J. 175, 195 (July 25).

139. Rudolf Bernhardt, *Customary International Law*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 898, 901 (Rudolf Bernhardt ed., 1992); Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 101-02 (1987); Kelly, *supra* note 132, at 526; Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 147-48 (1987); Martti Koskeniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1952-53 (1990).

by those states which are "specially affected"<sup>140</sup> by an emerging norm—as well as to resolutions of international organizations. Special authority in this regard is given to resolutions of the General Assembly.<sup>141</sup> The broad acceptance of a particular rule in the context of the responsibility to protect by the overwhelming majority of all states, coming together in the General Assembly or in another international forum, can therefore lead to the emergence of this rule as an international legal norm.

### 3. *The Significance of Nonstate Actors for the Lawmaking Process*

Although the lawmaking process is traditionally reserved for states, it has become increasingly accepted that international organizations and even NGOs exert an influence on lawmaking.<sup>142</sup> This development is of particular importance for the legal status of the responsibility to protect since the concept was introduced by a commission which—notwithstanding its ties with the Canadian government—cannot clearly be attributed to a state. And the further evolution was significantly expedited not only by the U.N. Secretariat but also by actors of civil society.<sup>143</sup> The influence of nongovernmental actors on the lawmaking process is less clear than the influence of international organizations. A consensus among the scholarly community is developing that NGOs can also be recognized as international actors which influence the lawmaking process.<sup>144</sup> However, at the present stage of development, the doctrinal explanation for this process is as vague as the understanding of the impact of civil society on the lawmaking process. Paradigmatic is Judge Van den Wyngaert's dissenting opinion in the *Arrest Warrant* case in which she criticizes the court's majority for ignoring the statements of nongovernmental organizations and institutes that "may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in the formation of customary international law today."<sup>145</sup> Judge Van den Wyngaert does not further elucidate in what way and to what extent the court should have taken these statements into account.

140. *North Sea Continental Shelf* (F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

141. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 182 (1986); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241-IV RECUEIL DES COURS 195, 277 (1993).

142. See, e.g., Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213 (2002).

143. See, e.g., GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69.

144. See, e.g., Louise Doswald-Beck, *Participation of Non-Governmental Entities in Treaty-Making: The Case of Conventional Weapons*, in MULTILATERAL TREATY-MAKING 41, 41-42 (Vera Gowlland-Debbas ed., 2002); Stephan Hobe, *The Role of Non-State Actors, in Particular of NGOs, in Non-Contractual Law-Making and the Development of Customary International Law*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, *supra* note 4, at 319; Rahmatullah Khan, *The Anti-Globalization Protests: Side-show of Global Governance, or Law-making on the Streets?*, 61 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 323, 335-45 (2001); Eibe Riedel, *The Development of International Law: Alternatives to Treaty-Making? International Organizations and Non-State Actors*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, *supra* note 4, at 301, 304.

145. *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 154-55 (Feb. 14) (dissenting opinion of Judge Van den Wyngaert).

While the legal significance of statements and opinions expressed by actors of civil society is still very vague, they are increasingly considered in the process of identifying norms of international law, especially norms of customary international law.<sup>146</sup> In this regard the report of the ICISS and the subsequent endorsement of the responsibility to protect by NGOs might be taken into account, although their normative weight should not be overrated. A concept that is solely promoted by civil society without the support of states or international organizations could not gain any legal significance within the contemporary international legal order.

#### 4. *The Dynamic-Evolutionary Method of Charter Interpretation*

With regard to the U.N. Charter, the dynamics of the international lawmaking process entail another peculiarity. As the legal framework of the international community, the U.N. Charter is considered a "living instrument."<sup>147</sup> This dynamic-evolutionary method of interpretation is often derived from the conception of the U.N. Charter as the constitution of the international community. According to this method, the Charter is to be interpreted in an effective way and in light of the subsequent practice of states as well as of the organs of the United Nations.<sup>148</sup>

#### D. *Conclusion*

Although the concept of the responsibility to protect is not an emerging legal norm, the rising recognition and acceptance of the concept may have an influence on already existing, more concrete legal norms. With regard to the more progressive aspects of the concept, which either do not refer to established norms of international law or which depart from existing rules of international law, the endorsement of the concept by the international community might lead to a change in international law. It is then not the concept of the responsibility to protect as such that will become a norm of international law, but rather a concrete norm of international law that will change in light of the responsibility to protect. One of the ways in which such a change can take place is the establishment of customary international law. Even without actual state practice, the statements of international actors can confer binding force on different aspects of the responsibility to protect if they achieve a sufficient level of concreteness and uniformity. As far as the responsibility to protect touches upon norms of the U.N. Charter, the

146. Treves, *supra* note 101, ¶ 33.

147. Salo Engel, "Living" *International Constitutions and the World Court*, 16 INT'L & COMP. L.Q. 865 (1967); Hilpold, *supra* note 95, at 67-68.

148. BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO 136-37 (1998); Brun-Otto Bryde, *International Democratic Constitutionalism*, in TOWARD WORLD CONSTITUTIONALISM 103, 109 (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005); Georg Ress, *The Interpretation of the Charter*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 112, at 15, 27-30; Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542, 570 (2005); Nico J. Schrijver, *The Future of the Charter of the United Nations*, in 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 5 (2006). For a critical view, see Gaetano Arangio-Ruiz, *The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue*, 8 EUR. J. INT'L L. 1 (1997).

endorsement can contribute to the dynamic interpretation of the Charter. For specific rules incorporated in the responsibility to protect to become binding law, it is therefore decisive that they are endorsed by representative organs of international organizations—such as the General Assembly—as well as by the community of states as a whole.

#### IV. THE INTERNATIONAL LEGAL FRAMEWORK OF THE USE OF FORCE AND COLLECTIVE SECURITY IN LIGHT OF THE RESPONSIBILITY TO PROTECT

The foregoing analysis of the international lawmaking process has shown that the responsibility to protect cannot be understood as a norm of customary international law. It has also shown that the conceptual change in the sovereignty principle that lies at the heart of the concept does not imply any immediate legal changes. However, this does not mean that the endorsement of the responsibility to protect by important actors of international law does not have any legal impact. In the light of the dynamic and open-structured process of international lawmaking, such an endorsement can lead to a modification of existing norms of international law. Against this background, the question arises as to whether the endorsement of the responsibility to protect and its various components has changed international law. I begin this analysis with the prohibition of the use of force and the nonintervention principle and then look at the powers, competences, and duties of the Security Council, the General Assembly, regional organizations, as well as single states acting outside of the institutional framework of the United Nations.

##### A. *The Prohibition of the Use of Force and the Nonintervention Principle*

The prohibition of the threat or use of force in Article 2(4) of the U.N. Charter has rightly been described as “the corner-stone of the Charter system.”<sup>149</sup> Notwithstanding its inherent weaknesses, which stem primarily from the malfunctioning of the collective security system in the way originally envisioned by the framers of the U.N. Charter,<sup>150</sup> international law has until now withstood all attempts by states or scholars to restrict the scope and content of the provision.<sup>151</sup> The prohibition of the use of force is complemented by the nonintervention principle, which prohibits coercive intervention into the exclusively domestic affairs of a state.<sup>152</sup> At first view,

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149. JAMES L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 414 (6th ed. 1963); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 732 (7th ed. 2008).

150. See, e.g., W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 642-45 (1984).

151. See Albrecht Randelzhofer, *Article 2(4)*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 112, at 112, 117-24.

152. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 107-08 (June 27); Philip Kunig, *Intervention, Prohibition of*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 84, ¶ 1. With regard to interventions by the United Nations, the nonintervention



the concept of the responsibility to protect does not delimitate the prohibition of the use of force or the nonintervention principle. The ICISS emphasizes the norm of nonintervention as the obligation to respect every other state's sovereignty<sup>153</sup> and affirms the bedrock nonintervention principle found in Article 2 of the U.N. Charter.<sup>154</sup> Neither does the World Summit Outcome Document imply any dilution of those prohibitions.

However, an implicit case for limiting the scope of the prohibition of the use of force as well as of the nonintervention principle could be made in light of the conceptual construction of sovereignty as encompassing responsibility. The concept of sovereignty as responsibility implies the conditionality of sovereign rights.<sup>155</sup> The sovereign right to nonintervention is deemed to be conditional on the state fulfilling its responsibility to protect the people within its territory. It is therefore argued from the logic of rights that when a state fails to fulfill its responsibility, it does not have a right against outside interventions undertaken to secure the rights of the people.<sup>156</sup> Taken seriously, this approach—which is hardly new<sup>157</sup>—cannot convincingly explain why interventions should be subject to any legal criteria. The only threshold for intervention would be the question of whether a state lives up to its human rights obligations. If this threshold were passed, a state would not have a sovereign right on which it could base a claim against intervention. From the inherent logic of this construction it is not possible to argue, for example, that the intervention must be proportional or to explain why measures must be subject to the right intention of the intervening state. If the state does not have a sovereign right against intervention, how could an intervention which is not proportional or not carried out for righteous motives violate this right? If, however, one was to subject the intervention to certain legal limits—as almost all proponents of humanitarian intervention would—then the question arises why some of the legal restrictions should apply and not all of them. From the perspective of the logic of rights, which is deemed to stem from the concept of sovereignty as responsibility, one can only argue that no legal restrictions exist on interventions when a state violates its responsibility toward its citizens. The legality of specific intervening measures cannot therefore be answered by a reference to the conceptual shift in the understanding of sovereignty. It can only be answered by international legal norms that define the scope and limits of state sovereignty in a more concrete way.

But even if one accepted that a change in the understanding of sovereignty could have an immediate impact on concrete legal norms, the notion of sovereignty as responsibility would not necessarily grant an argument in favor of intervention. Although the nonintervention norm has a close connection to the principle of sovereignty, the existence and scope of the

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principle is codified in Article 2(7) of the U.N. Charter. With regard to interventions by states, it is recognized as customary international law.

153. ICISS REPORT, *supra* note 2, ¶ 2.8.

154. *Id.* ¶ 6.2.

155. Rodin, *supra* note 89, at 55.

156. *Id.*

157. See, e.g., FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 178 (3d ed. 2005) (arguing that state sovereignty presupposes respect for human rights and that states that commit serious crimes forfeit their protection under Article 2(4) of the U.N. Charter).

former does not depend on the latter. Nonintervention has a legal basis of its own. Its conceptual basis lies not only in the principle of state sovereignty, but it is itself a structural principle of the international order. Nonintervention is owed not only to individual states but also to the international community as a whole.<sup>158</sup> It would therefore be too short-sighted to suspend the nonintervention principle on the grounds that a state has violated its human rights obligations. Such an argument would neglect that the nonintervention principle is not only an individual and sovereign right of the single state but also a structural principle of the international legal system. One can, therefore, accept the notion of conditional sovereignty—a concept of sovereignty that implies respect for fundamental human rights—without at the same time concluding that the principle of nonintervention does not apply when a state violates its human rights obligations.

### B. *The Powers and Competences of the Security Council*

The concept of the responsibility to protect envisions the Security Council as the most important international actor. Responsibility to protect deals with the competences of the Security Council with regard to the prevention and containment of massive human rights violations, tries to develop threshold criteria for Security Council action, aims at reducing the abusive use of the veto power, and emphasizes that the Security Council has not only a right to intervene but also a responsibility to protect people from serious crimes.

#### 1. *Competences Under Article 39 of the U.N. Charter*

Article 24(1) of the U.N. Charter vests the primary responsibility for the maintenance of international peace and security in the Security Council.<sup>159</sup> In order to satisfy this responsibility, the Security Council can invoke a number of competences under the Charter. When a conflict arises and the mechanisms for peaceful dispute settlement under Chapter VI of the U.N. Charter are insufficient, the Security Council can resort to an array of measures under Chapter VII of the U.N. Charter. These instruments include provisional measures (Article 40 of the U.N. Charter), economic or diplomatic sanctions (Article 41 of the U.N. Charter), and, as a last resort, the authorization of the use of force (Article 42 of the U.N. Charter). Before the Security Council can take coercive action it determines whether a specific situation constitutes a threat to the peace, a breach of the peace, or an act of aggression according to Article 39 of the U.N. Charter.<sup>160</sup> In practice the Security Council usually refrains from characterizing a situation as a breach of the peace or as an act of aggression and has mainly determined whether a certain condition can be

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158. Peters, *supra* note 86, at 534.

159. See *supra* note 97.

160. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39.

regarded as a threat to the peace.<sup>161</sup>

Particularly after the end of the Cold War, the Security Council has significantly widened the scope of what can constitute a threat to the peace.<sup>162</sup> According to this practice, the severe violation of human rights within a state can qualify as a threat to the peace and trigger coercive measures under Chapter VII of the U.N. Charter. In 1965, the Security Council found a proclamation of independence by a minority group within Southern Rhodesia to be a threat to the peace.<sup>163</sup> The Security Council held that the apartheid regime in South Africa itself constituted a threat to the peace,<sup>164</sup> but rather than emphasize the regime's oppression of persons internally, the Council focused on the potential destabilizing effect the regime might bring on neighboring states. In later instances, the Security Council more directly referred to the human rights situations in Somalia,<sup>165</sup> Rwanda,<sup>166</sup> and East Timor<sup>167</sup> as threats to the peace. This conceptual shift was acknowledged in a statement by the President of the Security Council in which he stipulated that the mere absence of war and military conflict among states does not itself ensure international peace and security—rather, intrastate humanitarian situations can also become threats to peace and security.<sup>168</sup>

A convincing case can be made for the legality of the Security Council's extensive reading of Article 39 of the U.N. Charter. Although human rights violations are not explicitly mentioned in that provision, the term "threat to the peace" is open-textured and allows for a broad reading.<sup>169</sup> This open language is even more significant contrasted with the much narrower focus of Article 11 of the Covenant of the League of Nations, which stipulated that war or the threat of war was a concern of the whole League of Nations.<sup>170</sup> Statements made at the San Francisco conference indicate that the drafters of the U.N. Charter deliberately intended to leave the determination of what constitutes a threat to the peace to the discretion of the Security Council.<sup>171</sup> This approach is further supported by the ruling of the International Court of Justice in the *Certain Expenses* case in which the court held that every organ

161. Erika de Wet & Michael Wood, *Peace, Threat to*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 84, ¶ 6.

162. See MICHAEL J. MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 41-64 (2006); Jennifer M. Welsh, *The Security Council and Humanitarian Intervention*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR 535, 537-53 (Vaughan Lowe et al. eds., 2008).

163. S.C. Res. 271, ¶ 1, U.N. Doc. S/RES/271 (Sept. 15, 1969).

164. S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

165. S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

166. S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994).

167. S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

168. *Note by the President of the Security Council*, U.N. Doc. S/23500 (Jan. 31, 1992).

169. Reisman, *supra* note 89, at 243; see also W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 93 (1993) (arguing that the "threat to the peace" criteria in Article 39 of the U.N. Charter was designed to be determined subjectively).

170. "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations . . . ." League of Nations Covenant art. 11, para. 1.

171. United Nations Conference on International Organization, S.F., U.S., Apr. 25-June 26, 1945, *Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII*, sec. B, U.N. Doc. 881 (English) III/3/46 (June 10, 1945), reprinted in III UNCIO XII 502, 505.

of the United Nations principally determines the scope of its jurisdiction.<sup>172</sup> And it is backed by a dynamic-evolutionary reading of the U.N. Charter which draws upon the constant practice of the Security Council. In this regard the responsibility to protect does not, on the first view, add anything substantially new to the competences of the Security Council under Article 39 and Chapter VII of the U.N. Charter. It is, therefore, rather confusing that the ICISS Report as well as the report of the High-Level Panel place this authority of the Security Council within a concept which they deem to be an "emerging norm."<sup>173</sup>

The endorsement of the responsibility to protect and the explicit commitment to the power of the Security Council to act in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity in the World Summit Outcome Document<sup>174</sup> is not, however, without significance. Although it is widely acknowledged under international law that the Security Council can take coercive and even military action for humanitarian purposes, this question is far from being uncontroversial.<sup>175</sup> The text of Article 39 of the U.N. Charter does not preclude such a broad interpretation, but it also does not support the humanitarian reading. Furthermore, the practice of the Security Council is not necessarily consistent. The Council acts on a case-by-case basis, and often emphasizes the unique character of a situation in which it decided to intervene.<sup>176</sup> It only rarely chooses to base its determination under Article 39 of the U.N. Charter on humanitarian reasons alone, instead complementing its determinations with references to the negative transboundary consequences of a deprived humanitarian situation.<sup>177</sup> The endorsement of the responsibility to protect can therefore contribute to the entrenchment of the power of the Security Council to take humanitarian action. More importantly, the responsibility to protect endows humanitarian action by the Security Council with a higher degree of legitimacy. While states and scholars have only rarely challenged the legality of the extensive practice of the Security Council, they have at times questioned its legitimacy.<sup>178</sup> Through its endorsement of the responsibility to protect, in particular at the World Summit, the international community moved from tolerating the practice of the Security Council to explicitly approving it. The unanimous endorsement of humanitarian Security Council action at the 2005 World Summit, therefore, provides its proponents with a convincing argument in favor of the legality and legitimacy of such action.

172. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20).

173. Reisman, *supra* note 89, at 243.

174. World Summit Outcome Document, *supra* note 41, ¶ 139; *see also* ICISS REPORT, *supra* note 2, ¶¶ 6.16-17.

175. The contrary view is expressed by Reisman, *supra* note 89, at 174; and Peters, *supra* note 86, at 538.

176. *See, e.g.*, S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

177. DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER 152 (2001).

178. *See, e.g.*, Martti Koskeniemi, *The Police in the Temple—Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 341 (1995).

## 2. *Threshold for Action*

Acknowledging the competence of the Security Council to mandate coercive action in order to prevent or contain human rights violations does not, however, answer the question of whether a certain threshold has to be reached before the Security Council can act. During the evolution of the responsibility to protect different kinds of threshold criteria have been discussed. The ICISS Report refers to “situations of compelling need for human protection” in which “preventive measures fail to resolve or contain the situation” and in which “a state is unable or unwilling to redress the situation.”<sup>179</sup> For measures below military force no specific threshold for action is specified. The report merely states that the barrier for political, economic, and judicial measures can be set lower than the threshold for military intervention.<sup>180</sup> In contrast, the ICISS Report sets out rather detailed criteria for military action.<sup>181</sup> Similar criteria for military action can be found in the High-Level Panel Report.<sup>182</sup> The World Summit, however, does not pick up on these specific criteria but stipulates in rather broad terms that the international community is prepared to take collective action through the Security Council if peaceful means are inadequate and national authorities are manifestly failing to protect their populations.<sup>183</sup> According to the World Summit, the system of collective security would, therefore, only come into play in instances where the state bearing the primary responsibility for its population “manifestly” fails to live up to its responsibility.<sup>184</sup>

These attempts to introduce a threshold for action have been criticized as potentially restricting timely and effective measures by the Security Council. The establishment of military action as a “last resort” has been characterized as an unnecessary burden on the Security Council, which would have to “patiently wend its way through diplomatic measures and economic sanctions” before it could use military measures to end genocide.<sup>185</sup> Other authors highlight that substantive criteria would establish a clear benchmark against which to judge the humanitarian claims of states.<sup>186</sup> However, from a legal perspective, the discussion of such criteria has not changed the existing law. Even in the ICISS Report, those criteria relate to the legitimacy of Security Council action, not to its legality.<sup>187</sup> It is not clear if they are meant to put a legal restriction on the scope of Security Council action. The same applies to the High-Level Panel Report, which discusses these criteria under the heading of legitimacy.<sup>188</sup> The World Summit Outcome Document, on the other hand, establishes a rather vague threshold when it refers to the

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179. ICISS REPORT, *supra* note 2, ¶ 4.1.

180. *Id.* ¶ 4.2.

181. *Id.* ¶¶ 4.10-43.

182. *High-Level Panel Report*, *supra* note 30, ¶ 207.

183. World Summit Outcome Document, *supra* note 41, ¶ 139.

184. *Id.*

185. Reisman, *supra* note 89, at 244.

186. See Nicholas J. Wheeler & Frazer Egerton, *The Responsibility To Protect: 'Precious Commitment' or a Promise Unfulfilled?*, 1 GLOBAL RESP. TO PROTECT 114, 121-22 (2009).

187. Evans, *supra* note 84, at 710-11.

188. *High-Level Panel Report*, *supra* note 30, ¶¶ 204-207.

"inadequacy" of peaceful means.<sup>189</sup> No clear "last resort" criterion is employed. Therefore, it appears that there are no compelling substantive limits on a determination by the Security Council with regard to when peaceful measures are inadequate and military action is deemed to be necessary. The same can be said concerning the qualification that the failure of a state to protect its population must be "manifest."<sup>190</sup> It is hardly conceivable that the Security Council could acknowledge a case of massive human rights violations without recognizing a manifest failure of the state.

A certain restraint on Security Council action might, however, result from the concept of shared responsibility. Throughout the development of the responsibility to protect, it has been continuously highlighted that the primary responsibility to protect lies with the state.<sup>191</sup> While this conceptual construction is meant to emphasize the obligation of a state and the conditionality of its sovereignty, it might also be used to argue for a restrictive use of the instruments under the U.N. system of collective security. As long as it is not clear that a state has failed to live up to its responsibility, it could be argued that the residual responsibility of the international community has not yet been triggered. In fact, it is exactly this potential restraint on intervention that facilitated consensus on the responsibility to protect at the World Summit.<sup>192</sup>

However, there are no established criteria to determine when the responsibility shifts from the state to the international community. From a legal perspective, the responsibility to protect does not establish—at least not at the present stage of its development—any substantive limits on Security Council action. With regard to the use of force, a basic limitation stems from the principle of proportionality as a general legal principle restricting action on the part of the Security Council.<sup>193</sup> The constant emphasis that military force may not be the first choice of the Security Council, but rather has to be the "last resort," can be read as an affirmation of the general applicability of the proportionality principal in international law. At the same time, it is hardly conceivable that it could substantively limit Security Council action with regard to genocide or other serious crimes. The principle of proportionality leaves a wide margin of appreciation to the Security Council. And practice shows that military action is usually not the starting point, but the endpoint of an escalating array of measures taken with regard to a conflict.

Apart from the strictly legal dimension, the concept of dual responsibility might prove to be a political obstacle for collective action. States may oppose Security Council action on the grounds of their primary responsibility and make it harder for the proponents of an intervention to argue that the responsibility of the international community is evoked. This potential impediment on the part of the responsibility to protect materialized

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189. World Summit Outcome Document, *supra* note 41, ¶ 139.

190. *Id.*

191. ICISS REPORT, *supra* note 2, ¶ 2.29.

192. Nicholas J. Wheeler, *A Victory for Common Humanity? The Responsibility To Protect After the 2005 World Summit*, 2 J. INT'L L. & INT'L REL. 95, 96, 102 (2005).

193. Jochen Abr. Frowein & Nico Krisch, *Introduction to Chapter VII*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 112, at 701, 711-12.

in the Darfur crisis. During the Security Council deliberations, states emphasized the primary responsibility of Sudan, and that a collective response would be premature.<sup>194</sup> The responsibility to protect may, therefore, even hinder an effective and timely reaction to genocide or other massive human rights violations.

### 3. *Exercise of the Veto Power*

According to Article 27(3) of the U.N. Charter, decisions of the Security Council shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.<sup>195</sup> While it is well-established practice that abstention does not avert a decision,<sup>196</sup> the U.N. Charter confers a veto right to the permanent members of the Security Council. While this veto power is commonly considered a necessary prerequisite for the great powers' engagement in the United Nations,<sup>197</sup> it paralyzed the Security Council during the Cold War and continues to prevent Security Council action in cases where one or more permanent member has an interest in avoiding such action. Moreover, the preferential treatment of five states is deemed to be anachronistic and undemocratic and increasingly undermines the legitimacy of the Security Council and its decisions. The reform of the Security Council is, therefore, a permanent item on the perennial agenda of U.N. reform.<sup>198</sup> A reform of the veto power has at times been discussed<sup>199</sup> but has not played a significant role during the last round of the reform discussion, which focused on an enlargement of the Security Council in order to make it more representative.<sup>200</sup> Since any change in the institutional structure of the Security Council needs the approval of the permanent members of the Security Council,<sup>201</sup> the international community seems to have accepted that the permanent members will not voluntarily renounce their veto privilege.<sup>202</sup>

Alternative attempts to make the Security Council more effective therefore aim at restraining the use of the veto within the existing institutional

194. See Alex J. Bellamy, *Responsibility To Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq*, 19 ETHICS & INT'L AFF. 31, 33 (2005); Stahn, *supra* note 11, at 116-17 (speaking of a "complementarity trap"); Wheeler, *supra* note 192, at 102.

195. "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . ." U.N. Charter art. 27, para. 3.

196. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 22 (June 21); FASSBENDER, *supra* note 148, at 178.

197. Thomas Bruha, *Security Council*, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 1147, 1157-58 (Rüdiger Wolfrum ed., 1995). For a historical account, see FASSBENDER, *supra* note 148, at 163-70.

198. For an overview of the history of the reform debate, see Wolfram Karl, Bernd Mützelburg & Georg Witschel, *Article 108*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 112, at 1341, 1356-57.

199. See, e.g., FASSBENDER, *supra* note 148, at 263-75.

200. See *High-Level Panel Report*, *supra* note 30, ¶¶ 244-260; *In Larger Freedom*, *supra* note 37, ¶¶ 167-170. There is, however, a far-reaching consensus that new members of the Security Council should not be provided with a veto right.

201. See U.N. Charter arts. 108-09.

202. See *High-Level Panel Report*, *supra* note 30, ¶ 256 ("We see no practical way of changing the existing members' veto powers.").

structure and without an amendment of the U.N. Charter. The ICISS Report highlights the pivotal role of the Security Council and the unacceptable and unbearable prospect that “one veto can override the rest of humanity on matters of grave humanitarian concern.”<sup>203</sup> The ICISS Report suggests that the permanent members of the Security Council agree on a code of conduct for the use of the veto according to which they refrain from exercising their veto rights with regard to actions that need to be taken to stop a humanitarian crisis when no vital national interests of the permanent five members are involved.<sup>204</sup> While the ICISS sees no prospect for a respective Charter amendment, it suggests that the permanent members adopt a “formal, mutually agreed practice.”<sup>205</sup> The High-Level Panel picks up on this proposal—albeit in weaker terms—when it asks for a use of the veto power limited to matters of vital interest.<sup>206</sup> The reports of the Secretary-General do not explicitly refer to any formal restriction of the use of the veto. And an earlier draft of the World Summit Outcome Document “invite[d] the permanent members of the Security Council to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>207</sup> Nevertheless, the permanent members could not even agree to this moderate language. In a letter to the President of the General Assembly, the U.S. Representative to the United Nations, John Bolton, expressed that the United States would not accept any legal obligation of the Security Council or of the permanent members under the responsibility to protect.<sup>208</sup> Following this political intervention, the reference to a restrictive use of the veto was deleted from the text.

The endorsement of the responsibility to protect therefore does not establish any legal restraints on the use of the veto. Even the proposal of the ICISS, which was supported by the High-Level Panel, did not suggest that such limits existed or that they should be imposed on the Security Council from the outside. It demanded action from the permanent members, and the permanent members—maybe with the exception of France, whose Minister of Foreign Affairs initiated the idea in the first place<sup>209</sup>—clearly demonstrated their reluctance to such a restriction on their powers.<sup>210</sup> The possibility of deeming a veto “illegal” due to a violation of the responsibility to protect can therefore only be seen as a proposal *de lege ferenda*.<sup>211</sup>

Even if the responsibility to protect does not legally restrict the use of

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203. ICISS REPORT, *supra* note 2, ¶¶ 6.13, 6.20.

204. *Id.* ¶ 6.21.

205. *Id.*

206. *High-Level Panel Report*, *supra* note 30, ¶ 256.

207. President of the General Assembly, *Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005*, ¶ 119, U.N. Doc. A/59/HLP/CRP.1/Rev.2 (Aug. 5, 2005).

208. Letter from John R. Bolton, Representative of the U.S. to the United Nations (Aug. 30, 2005) (on file with author).

209. See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 379 (2001).

210. Lloyd Axworthy & Allan Rock, *R2P: A New and Unfinished Agenda*, 1 GLOBAL RESP. TO PROTECT 54, 61 (2009).

211. See Peters, *supra* note 86, at 539-40. But see Louise Arbour, *The Responsibility To Protect As a Duty of Care in International Law and Practice*, 34 REV. INT’L STUD. 445, 453-54 (2008) (arguing that the exercise of the veto could violate the vetoing state’s obligation under the Genocide Convention).



the veto, the concept might have an influence on the behavior of the permanent members of the Security Council. It highlights that the veto power entails a corresponding responsibility of the permanent members. Unlike Article 24(1) of the U.N. Charter, which refers only to the responsibility of the Security Council for peace and security, the responsibility to protect links the power of the Security Council explicitly to the humanitarian responsibility for the well-being of individuals. The further entrenchment of the concept within international politics might make it harder for a permanent member to justify the use of the veto politically. Utilizing the concept of the responsibility to protect, the international community can exercise pressure on a state that threatens to block a humanitarian decision with its veto. However, the prospect of success of such an approach is rather bleak, since the criteria for action under the responsibility to protect are very vague. In addition, the veto power is hardly ever explicitly exercised. The mere threat of a veto is usually sufficient to ban an item from the Security Council agenda.

#### 4. *Duty To Act?*

Notwithstanding the legal ambiguity of the term “responsibility,”<sup>212</sup> the responsibility to protect implicitly suggests mandatory Security Council action in the face of massive human rights violations. The Security Council’s objections to the idea of mandatory action are reflected in its positions on the responsibility to protect following the ICISS Report. The High-Level Panel Report focuses more on competences than on obligations of the Security Council and mentions the collective responsibility of the international community only cautiously.<sup>213</sup> Similarly, the Secretary-General has spoken of a responsibility of the international community but has not referred to a specific responsibility of the Security Council.<sup>214</sup> The World Summit is even more restrictive in the limited responsibility of the international community it acknowledges, and it emphasizes nonmilitary measures.<sup>215</sup> Security Council action is left to a case-by-case evaluation of the appropriate reaction. John Bolton’s letter to the President of the General Assembly clearly articulates one member state’s refusal to accept any legal obligation of the Security Council.<sup>216</sup> In light of these developments, the responsibility to protect neither establishes nor supports the idea that the Security Council is under a legal obligation to take action when a humanitarian crisis occurs.

#### C. *The Powers and Competences of the General Assembly*

When the Security Council fails to authorize a humanitarian intervention, the question arises whether other international actors can substitute this authority and provide a legal justification for military action. Although the U.N. Charter explicitly recognizes only two exemptions from

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212. See *supra* Subsection III.A.2.

213. *High-Level Panel Report*, *supra* note 30, ¶¶ 199-203.

214. *In Larger Freedom*, *supra* note 37, ¶ 135.

215. World Summit Outcome Document, *supra* note 41, ¶¶ 138-139.

216. Letter from John R. Bolton, *supra* note 208.

the prohibition of the use of force—self-defense under Article 51 of the U.N. Charter and authorization by the Security Council under Chapter VII of the U.N. Charter<sup>217</sup>—alternative means of authorizing the use of force have been considered. Within the institutional framework of the United Nations, the General Assembly appears to be the only organ potentially capable of authorizing coercive measures if the Security Council failed to act. Article 24(1) of the U.N. Charter establishes the primary responsibility of the Security Council with regard to the maintenance of international peace and security, thereby leaving room for a secondary or residual competence of the General Assembly.<sup>218</sup> Consequently, Article 10 of the U.N. Charter vests a broad competence in the General Assembly to discuss any questions or any matters within the scope of the Charter, and Article 11 of the U.N. Charter explicitly extends this competence to questions of international peace and security.<sup>219</sup> Article 12(1) of the U.N. Charter, however, prohibits the General Assembly from making recommendations as long as the Security Council is exercising its functions under the Charter with regard to a particular dispute or situation.<sup>220</sup> Under the U.N. Charter, the General Assembly plays only a limited role within the system of collective security.

The Uniting for Peace Resolution constitutes an attempt to enlarge the role of the General Assembly in this regard.<sup>221</sup> It was adopted in 1950 against the background of the Security Council's incapability to act due to the USSR's strategy to use its veto power to prevent support for the Republic of Korea against military aggression from North Korea.<sup>222</sup> Through the Uniting for Peace Resolution, the General Assembly claims a subsidiary responsibility with regard to international peace and security, and aims at overcoming the paralysis of the U.N. system of collective security. In its most important part,

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217. Article 107 of the U.N. Charter, the so-called enemy state clause, does not have practical relevance anymore. Georg Ress, *Article 107*, in 2 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 112, at 1330, 1332.

218. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 148 (July 9); Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 162-163 (July 20).

219.

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

U.N. Charter art. 11, paras. 1-2.

220. "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." U.N. Charter, art. 12, para. 1.

221. Uniting for Peace, G.A. Res. 377 (V), U.N. Doc. A/1775 (Nov. 3, 1950).

222. Barbara Nolte, *Uniting for Peace*, in 2 *UNITED NATIONS: LAW, POLICIES AND PRACTICE*, *supra* note 197, at 1341.

the resolution concludes:

[T]hat if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>223</sup>

Procedurally, the resolution establishes the basis for emergency sessions of the General Assembly and accordingly amends the General Assembly's rules of procedure. Substantively, the resolution provides for the competence of the General Assembly to recommend coercive measures and even the use of force. While the legality of different aspects of the resolution has been subject to controversy,<sup>224</sup> its practical relevance is rather marginal. The resolution has been used to convey emergency sessions and to make recommendations, ranging from appeals to end hostilities<sup>225</sup> to asking for the establishment of a peacekeeping operation.<sup>226</sup> Only in the Korea crisis has the General Assembly recommended coercive measures,<sup>227</sup> and since the relevant resolution does not mention the Uniting for Peace Resolution, it is debatable whether this actually constituted an example of action within the Uniting for Peace framework.<sup>228</sup>

Furthermore, under the Uniting for Peace Resolution the General Assembly is limited to making nonbinding recommendations.<sup>229</sup> It cannot oblige the member states to take action. A General Assembly resolution that recommends the use of force does not, by itself, justify the use of force by states.<sup>230</sup> This reading is supported by Article 11(2) of the U.N. Charter, according to which the General Assembly may discuss and make recommendations with regard to questions relating to the maintenance of international peace and security but has to refer the question to the Security Council if "action" is necessary.<sup>231</sup> The ICJ has clarified that "action" in the sense of Article 11(2) of the U.N. Charter means coercive or enforcement action which is solely within the province of the Security Council under

223. Uniting for Peace, *supra* note 221, ¶ 1.

224. For an overview, see Christina Binder, *Uniting for Peace (1950)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 84, ¶¶ 13-22.

225. G.A. Res. 2793 (XXVI), U.N. Doc. A/8429 (Dec. 7, 1971).

226. G.A. Res. 1000 (ES-I), U.N. Doc A/3354 (Nov. 5, 1956).

227. G.A. Res. 498 (V), ¶ 4, U.N. Doc. A/1775/Add. 1 (Feb. 1, 1951).

228. See MALANCZUK, *supra* note 124, at 392-93 (arguing that in light of the invasion of the Republic of Korea the coercive action of states might be regarded as the exercise of collective self-defense under Article 51 of the U.N. Charter).

229. *Implementing the Responsibility To Protect*, *supra* note 59, ¶ 63; Jean Krasno & Mitushi Das, *The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council*, in THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 173, 191 (Bruce Cronin & Ian Hurd eds., 2008).

230. Binder, *supra* note 224, ¶ 30. *But see* Reisman, *supra* note 89, at 246 (arguing that a humanitarian intervention authorized by the General Assembly would not constitute a violation of international law).

231. *See supra* note 219.

Chapter VII of the U.N. Charter.<sup>232</sup>

Against this background it comes as a surprise that the ICISS Report discusses in great detail the possibility of regarding the General Assembly as a source of authority for military intervention.<sup>233</sup> The ICISS Report highlights the General Assembly's fallback responsibility with regard to the maintenance of international peace and security and concludes that although the Assembly has only recommendatory powers, "an intervention which took place with the backing of a two-thirds vote in the General Assembly would clearly have powerful moral and political support."<sup>234</sup> Furthermore, the ICISS Report regards the mere possibility that the General Assembly could recommend an intervention as an "important additional form of leverage on the Security Council to encourage it to act decisively and appropriately."<sup>235</sup> Within the subsequent endorsements of the responsibility to protect, however, the General Assembly does not play any role in the context of the authorization of the use of force. The High-Level Panel, the Secretary-General, and the World Summit unequivocally confirm that the Security Council is the sole organ that can authorize the use of force.<sup>236</sup>

As a consequence, the responsibility to protect does not add much to the existing status of the General Assembly under international law. It merely refers to the Assembly's competences under the U.N. Charter and the Uniting for Peace Resolution and to the legitimizing force the endorsement by the Assembly would have for an intervention. The ICISS Report does not suggest that a resolution by the General Assembly could legalize an intervention which takes place without a Security Council mandate. To argue that a recommendation by the General Assembly "might have a moral and political weight sufficient to categorize the use of force as 'legal' even without the Security Council's endorsement"<sup>237</sup> is to misconceive the fundamental and qualitative difference between legality and legitimacy. The concept of the responsibility to protect clearly distinguishes and respects these different categories.

The Secretary-General's 2009 report on *Implementing the Responsibility To Protect* highlights a different dimension of the Uniting for Peace Resolution. While the Secretary-General does not consider that the General Assembly could legally authorize a military intervention, he regards it as an appropriate forum to consider sanctions below the threshold of military force.<sup>238</sup> While this does not enlarge the scope of sanctions, the General Assembly could, according to this proposal, become a forum for the coordination of sanctions by individual member states when the Security

232. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 164-65 (July 20).

233. ICISS REPORT, *supra* note 2, ¶¶ 6.7, 6.29-30.

234. *Id.* ¶ 6.7.

235. *Id.* ¶ 6.30.

236. The World Summit Outcome Document only notes "the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter." World Summit Outcome Document, *supra* note 41, ¶ 80.

237. Thomas G. Weiss, *The Illusion of UN Security Council Reform*, 26 WASH. Q. 147, 155 (2003).

238. *Implementing the Responsibility To Protect*, *supra* note 59, ¶ 57.

Council does not decide upon collective action.

#### D. *The Powers and Competences of Regional Organizations*

The ICISS Report also identifies collective interventions by regional or sub-regional organizations as a possible alternative when the Security Council fails to act.<sup>239</sup> Regional organizations are deemed to be at times better suited and more willing to take action.<sup>240</sup> At the same time, the ICISS Report acknowledges that according to Article 53(1) of the U.N. Charter, military action without the consent of the affected state or a justification under Article 51 is legal only if it is authorized by the Security Council.<sup>241</sup> The ICISS Report, however, continues to refer to cases in which regional organizations have carried out an intervention and only subsequently sought the approval of the Security Council<sup>242</sup> and declares that “there may be certain leeway for future action in this regard.”<sup>243</sup> In this regard, the ICISS proposal clearly departs from the U.N. Charter.<sup>244</sup>

Despite this deviation, the responsibility to protect cannot be deemed to have changed international law with regard to the powers of regional organizations. The ICISS Report itself is rather cautious and does not identify an accepted trend in practice but rather speculatively concludes that there may be an opening for future development.<sup>245</sup> More importantly, subsequent endorsements of the responsibility to protect have been much more restrictive regarding intervention by regional organizations without prior authorization of the Security Council. The High-Level Panel Report emphasizes that regional organizations have to act within the U.N. framework, although it recognizes the possibility of an ex post facto authorization in urgent situations.<sup>246</sup> The Secretary-General does not discuss regional organizations within the responsibility to protect concept. The World Summit refers to Chapter VIII of the U.N. Charter and declares that collective action will be taken “in cooperation with relevant regional organizations as appropriate.”<sup>247</sup> The most authoritative endorsements of the responsibility to protect thereby do not acknowledge the possibility that an intervention by a regional organization could be legal due to an ex post facto authorization by the Security Council.

#### E. *Unilateral and Collective Action Outside the U.N. Charter Framework*

One of the most controversial topics touched upon by the responsibility to protect is the question of whether individual states or coalitions of states may exercise the responsibility to protect through coercive or even military

239. ICISS REPORT, *supra* note 2, ¶ 6.31.

240. *Id.* ¶¶ 6.31-32.

241. *Id.* ¶ 6.35.

242. *Id.* ¶ 6.5.

243. *Id.* ¶ 6.35.

244. Hilpold, *supra* note 95, at 52.

245. ICISS REPORT, *supra* note 2, ¶ 6.35.

246. *High-Level Panel Report*, *supra* note 30, ¶¶ 270-273.

247. World Summit Outcome Document, *supra* note 41, ¶¶ 93, 139.

means without Security Council authorization. The legality of unilateral humanitarian intervention has to be distinguished from the legality of nonmilitary countermeasures. Finally, the responsibility to protect raises the question of whether there is a duty of single states to act when other states violate human rights.

### 1. *Unilateral Humanitarian Intervention*

The legality of military intervention for humanitarian purposes without authorization by the Security Council has been the subject of the most controversial debates. Moral and political considerations blend in with the legal discourse and increase its complexity. Nevertheless, the U.N. Charter generally prohibits the use of force and provides only for narrow exceptions. Some scholars have argued that humanitarian interventions do not violate the territorial integrity or political independence of a state and therefore do not fall under Article 2(4) of the U.N. Charter.<sup>248</sup> Others have made the case for the permissibility of humanitarian intervention in light of morality and human rights.<sup>249</sup> Such attempts to restrict the scope of Article 2(4) of the U.N. Charter or to enlarge the number of exceptions to the prohibition of the use of force have thus far failed to meet the consensus of the international community.<sup>250</sup> In light of the mechanisms of the international lawmaking process, a convincing case for the legality of unilateral humanitarian intervention would require overwhelming support by the international community, including the vast majority of states and international organizations. Unilateral humanitarian interventions without authorization of the Security Council have at times been silently tolerated.<sup>251</sup> However, this does not mean that they have become legal, even though the international community might not impose significant penalties on states that intervene in order to prevent or contain genocide.<sup>252</sup> Even the 1999 NATO intervention in Kosovo has most prominently been qualified as "illegal but legitimate."<sup>253</sup> The international community is far from having reached a consensus with regard to the legality of unilateral humanitarian intervention. The majority of states explicitly refuse to accept that such interventions could be deemed legal.<sup>254</sup>

Might the emergence of the responsibility to protect have changed this state of the law? Some authors argue that the endorsement of the concept supports the claim that unilateral military intervention could be legal even in

248. W. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention To Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed., 1973).

249. TESÓN, *supra* note 157.

250. Randelzhofer, *supra* note 151, ¶¶ 53-56; see also Reisman, *supra* note 89, at 248. For a passionate defense of the *ius contra bellum*, see Antônio Augusto Cançado Trindade, *International Law for Humankind: Toward a New Jus Gentium* (pt. 1), 316 RECUEIL DES COURS 9, 122-45 (2005).

251. See Thomas M. Franck, *When, if Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 64-65 (2001).

252. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 191 (2002).

253. INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999).

254. See BROWNIE, *supra* note 149, at 744.

the absence of an authorization by the U.N. Security Council.<sup>255</sup> Such a reading relies more on a subjective understanding of the concept than on its actual content. The ICISS Report accepts the U.N. Charter framework and determines the Security Council as the most appropriate body to authorize humanitarian interventions.<sup>256</sup> While the ICISS Report falls short of explicitly deeming unilateral humanitarian intervention without a Security Council mandate illegal, it could not find a consensus with regard to the “validity” of unauthorized interventions. Accordingly, it characterizes the bypassing of the Security Council as “damage to international order.”<sup>257</sup> The ICISS Report merely points out that such interventions are likely to happen if the Security Council fails to live up to its responsibility and indicates the damage this might entail to the legitimacy of the Council.<sup>258</sup> Furthermore, the declaration in the ICISS Report that every state has a responsibility to react to serious human rights violations does not automatically imply that every state has a right to intervene militarily even without authorization by the Security Council. Neither can the assertion of a conceptual change in the understanding of sovereignty lead to such an assumption.<sup>259</sup> Therefore, the ICISS Report does not provide an argument in favor of the legality of unilateral intervention without an authorization of the Security Council.<sup>260</sup>

Such an argument can, furthermore, not be derived from subsequent endorsements of the concept. The High-Level Panel focuses on Security Council action and does not deal with the enforcement of the responsibility to protect by individual states or state coalitions.<sup>261</sup> The Secretary-General emphasizes that the task was “not to find alternatives to the Security Council as a source of authority but to make it work better”<sup>262</sup> and points out that the concept does not alter, but rather reinforces the legal obligation of member states to refrain from the use of force except in conformity with the U.N. Charter.<sup>263</sup> The World Summit Outcome Document, however, while not supporting unilateral intervention, encompasses more ambivalent language. The heads of state and government do not explicitly state that the Security Council is the only instance of authority with regard to military interventions, and they do not explicitly rule out alternative means of coercive action against grave human rights violations. Nonetheless, the World Summit Outcome Document places the responsibility to protect within the institutional framework of the United Nations and the Security Council in particular. At the same time, the section of the World Summit Outcome Document on the use of force may be read as not excluding the unauthorized use of force. The

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255. VERLAGE, *supra* note 84, at 293-331; C.F. Amerasinghe, *The Conundrum of Recourse to Force—To Protect Persons*, 3 INT'L ORGS. L. REV. 7, 46-47 (2006); Bannon, *supra* note 86, at 1162-63; Kindiki, *supra* note 110, at 458; *see also* Venkateswara S. Mani, “Humanitarian” Intervention Today, 313 RECUEIL DES COURS 9, 297 (2005) (criticizing the responsibility to protect because it legitimizes unilateralism outside of the framework of the U.N. Charter).

256. ICISS REPORT, *supra* note 2, ¶ 6.14.

257. *Id.* ¶ 6.37.

258. *Id.* ¶¶ 6.38-40.

259. *See supra* Section III.B.

260. Evans, *supra* note 84, at 711-12.

261. *High-Level Panel Report*, *supra* note 30, ¶ 203.

262. *In Larger Freedom*, *supra* note 37, ¶ 126.

263. *Implementing the Responsibility To Protect*, *supra* note 59, ¶ 3.

world leaders reiterate their obligation to refrain from the threat or use of force in any manner inconsistent with the Charter and stress the importance of acting in accordance with its purposes and principles.<sup>264</sup> This wording leaves room for the possibility to resort to force without Security Council authorization in order to pursue the purposes of the U.N. Charter, which according to Article 1(3) of the U.N. Charter include the respect for human rights. As John Bolton's letter to the President of the General Assembly indicates, the United States did not want to "preclude the possibility of action absent authorization by the Security Council."<sup>265</sup>

Even in light of some rather ambivalent statements, the responsibility to protect does not entail any change with regard to the legality of humanitarian interventions without prior authorization of the U.N. Security Council. While the relevant documents do not rule out such interventions, they neither explicitly nor implicitly make a claim for the legality of unauthorized intervention.<sup>266</sup>

Recent international practice unfortunately confirms the fear that the responsibility to protect might be used as a justification for unauthorized interventions by single states. The United States and the United Kingdom referred to serious human rights violations committed by Saddam Hussein and the Ba'ath regime in order to legitimize the invasion of Iraq.<sup>267</sup> Russian Foreign Minister Sergei Lavrov employed the responsibility to protect in the context of Russia's use of force in Georgia.<sup>268</sup> Although scholars have convincingly argued against this kind of availment of the concept,<sup>269</sup> these incidents show how susceptible to abuse the responsibility to protect is. They fuel the resentment of states such as Cuba, Venezuela, Sudan, Pakistan, and Nicaragua, which prominently voiced their criticism toward the concept during the 63rd Session of the General Assembly.<sup>270</sup>

## 2. Countermeasures Below the Threshold of Military Force

One widely accepted aspect of the responsibility to protect is the responsibility of the international community to react to serious crimes with measures below the threshold of the use of force.<sup>271</sup> When serious human rights violations occur, other states are allowed to react to this violation through diplomatic, political, or economic sanctions. Even the rather restrictive World Summit Outcome Document acknowledges the international

264. World Summit Outcome Document, *supra* note 41, ¶¶ 77, 79.

265. Letter from John R. Bolton, *supra* note 208.

266. See also Gelijn Molier, *Humanitarian Intervention and the Responsibility To Protect After 9/11*, 53 NETHERLANDS INT'L L. REV. 37, 52 (2006); Peters, *supra* note 86, at 537; Stahn, *supra* note 11, at 107.

267. Nanda, *supra* note 103, at 371-72.

268. Barbour & Gorlick, *supra* note 84, at 559.

269. Bannon, *supra* note 86, at 1164; Evans, *supra* note 84, at 717-18; Kenneth Roth, *Was the Iraq War a Humanitarian Intervention? And What Are Our Responsibilities Today?*, in *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY* 101 (Richard H. Cooper & Juliette Voinov Kohler eds., 2009); Thakur & Weiss, *supra* note 83, at 37.

270. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 4-5, 7; INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 69, at 7-8.

271. See BELLAMY, *supra* note 9, at 165-66; Stahn, *supra* note 11, at 109.



community's responsibility to use appropriate diplomatic, humanitarian, and other peaceful means through the United Nations.<sup>272</sup> This is remarkable considering the World Summit's general reluctance to accept a more concrete responsibility to prevent or to consider particular responsibilities of the Security Council. Within this context, the question arises of what measures individual states may resort to in order to exercise their responsibility to protect. They may implement economic, diplomatic, or political sanctions that were imposed by the Security Council under Chapter VII of the U.N. Charter. Outside of the Charter framework, a state may react to massive human rights violations by way of a retorsion, a sanction that is "unfriendly" but does not violate any international obligation of the acting state.<sup>273</sup> A state may generally cease its economic or diplomatic cooperation with another state at its will. However, in the modern international legal system, which is characterized by intense cooperation among states, the unilateral imposition of economic, diplomatic, or political sanctions may easily constitute a breach of international law.<sup>274</sup> For example, a state that imposes economic sanctions against another state may violate its obligations under WTO law or other multilateral or bilateral treaties.

Likewise, the freezing of assets of a foreign state normally constitutes a violation of that state's property rights.<sup>275</sup> If such measures are not justified under specific treaty provisions or authorized by competent international organizations, the question arises whether they can be justified under general international law as a countermeasure. A countermeasure can be defined as an act of noncompliance by a state with its obligations toward another state, taken in response to a previous international wrongful act of that state and directed against that state.<sup>276</sup> Such countermeasures are lawful and preclude the wrongfulness of the violation of the state's international obligation if they are carried out in accordance with specific procedural and substantial requirements.<sup>277</sup>

This availability of countermeasures is widely recognized under general international law.<sup>278</sup> However, due to the bilateralist structure of international legal relationships,<sup>279</sup> only the state to which an international obligation is owed can resort to countermeasures.<sup>280</sup> This approach is reflected in the International Law Commission's 2001 Draft Articles on State Responsibility.

272. World Summit Outcome Document, *supra* note 41, ¶ 138.

273. See Int'l Law Comm'n, *Report of the International Law Commission*, U.N. Doc. A/56/10, 325 (2001).

274. See, e.g., James Crawford, Special Rapporteur, *Third Report on State Responsibility Delivered to the International Law Commission*, ¶ 391, U.N. Doc. A/CN.4/507/Add.4 (Aug. 4, 2000).

275. CHRISTIAN TAMS, *ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW* 209 (2005).

276. See *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, 55 (Sept. 25); Responsibility of States for Internationally Wrongful Acts, *supra* note 91, arts. 22, 49; TAMS, *supra* note 275, at 20.

277. See *Gabčíkovo-Nagymaros Project*, Judgment, 1997 I.C.J. at 55-57; Responsibility of States for Internationally Wrongful Acts, *supra* note 91, arts. 49-53.

278. See, e.g., SHAW, *supra* note 123, at 794-96.

279. See Simma, *supra* note 126, at 230-33.

280. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 181-82 (Apr. 11). For a comprehensive and detailed analysis, see TAMS, *supra* note 275, at 48-96.

Article 42 of the ILC Articles establishes that a state is entitled as an injured state to invoke the responsibility of another state if that state breached an obligation and that obligation was owed to the state that wants to invoke the responsibility.<sup>281</sup> According to Article 49(1) of the ILC Articles, the injured state is allowed to resort to countermeasures.<sup>282</sup> This enforcement mechanism is insufficient with regard to the responsibility to protect. The responsibility to protect aims at preventing or containing human rights violations that take place within the territory of a particular state. Unless nationals of another state are victims of these human rights violations, there is no injured state in the sense of Article 42 of the ILC Articles that could resort to measures under the ILC regime of state responsibility. However, the obligations encompassed by the responsibility to protect—obligations stemming from the prohibition of serious human rights violations—are owed not only to single states but to the international community as a whole, as obligations *erga omnes*.<sup>283</sup> In its *Barcelona Traction* dictum, the ICJ assumed that the prohibition of genocide and the principles and rules concerning the basic rights of the human person fall within the scope of obligations *erga omnes*.<sup>284</sup> This recognition of the *erga omnes* character of the obligations in question does by itself not significantly widen the scope of action for states. Article 48(1)(b) of the ILC Articles stipulates that a state that is not injured by a violation may invoke the responsibility of the violating state when the breached obligation is an obligation *erga omnes*.<sup>285</sup> But according to Article 48(2) of the ILC Articles, this entitlement to invoke responsibility merely encompasses that states may claim cessation, assurances and guarantees of nonrepetition, as well as the performance of the obligation of reparation from the responsible state.<sup>286</sup>

The prohibitions of the serious crimes encompassed by the responsibility to protect are, moreover, recognized as peremptory norms of international law (*jus cogens*).<sup>287</sup> According to Article 40 of the ILC Articles, the serious breach of an obligation under peremptory norms of general international law triggers a subset of specific legal consequences.<sup>288</sup> The crimes encompassed by the responsibility to protect would certainly fulfill this requirement, but again, the specific consequences linked to the qualification of an act as a serious breach of an obligation under peremptory norms are rather limited. According to Article 41(1) of the ILC Articles, states shall cooperate to bring any serious breach to an end through lawful means, and Article 41(2) of the ILC Articles prohibits recognizing as lawful a situation created by a serious breach or rendering aid or assistance in maintaining such a situation.<sup>289</sup> With regard to the right of not directly affected states to resort to countermeasures—so-called

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281. Responsibility of States for Internationally Wrongful Acts, *supra* note 91, at 10.

282. *Id.* at 11.

283. Kindiki, *supra* note 110, at 466; Peters, *supra* note 86, at 526.

284. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Second Phase, 1970 I.C.J. 3, 32 (Feb. 5).

285. Responsibility of States for Internationally Wrongful Acts, *supra* note 91, at 11.

286. *Id.*

287. Barbour & Gorlick, *supra* note 84, at 541; Neville F. Dastoor, *The Responsibility To Refine: The Need for a Security Council Committee on the Responsibility To Protect*, 22 HARV. HUM. RTS. J. 25, 26-27 (2009).

288. See Responsibility of States for Internationally Wrongful Acts, *supra* note 91, at 9.

289. *Id.*

collective countermeasures or countermeasures of general interest<sup>290</sup>—Article 54 of the ILC Articles stipulates that the chapter of which it is a part does not prejudice the right of any state to take lawful measures against other states to ensure cessation of the breach and reparation.<sup>291</sup> The ILC Articles do not, however, answer the question of whether the resort to countermeasures by states that are not directly affected is legal when a serious breach of a peremptory norm is involved. The ILC Articles deliberately leave the question open “to the further development of international law.”<sup>292</sup>

Can the endorsement of the responsibility to protect provide an argument in favor of the legality of such countermeasures in the general interest exercised by states that are not directly affected by a violation of international law? The ICISS Report views measures short of military action as an integral part of the responsibility to react.<sup>293</sup> It does not, however, clearly distinguish between retorsions and countermeasures, and it does not specifically answer the question of whether countermeasures may be taken only upon authorization by the U.N. Security Council, only by injured states, or by all states. The examples for possible sanctions given by the ICISS Report include measures which are usually taken by individual states unilaterally or collectively with other states.<sup>294</sup> The commission was, furthermore, aware of the practice that sanctions are used unilaterally and collectively by individual states and by the United Nations.<sup>295</sup> And while the ICISS Report sees the authority to legalize a military intervention concentrated in the Security Council, it does not limit other sanctions to the U.N. framework or to injured states. The responsibility to protect is a responsibility of the international community as a whole. Therefore, every member of the international community should have the right to respond with nonmilitary countermeasures if a state does not live up to its responsibility. Against this background, the inclusion of sanctions in the endorsement of the responsibility to react can be regarded as an argument favoring the legality of nonmilitary collective countermeasures.

The High-Level Panel Report hardly addresses this issue and does not provide an argument for or against collective countermeasures. While the report acknowledges the responsibility to protect and sees it as a responsibility of the wider international community,<sup>296</sup> it does not specify to which measures individual states can resort outside of the institutionalized framework of the United Nations. As with military interventions, the High-Level Panel discusses sanctions solely with regard to the U.N. Security Council.<sup>297</sup>

Similarly, the Secretary-General discusses sanctions only in the context

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290. See Denis Alland, *Countermeasures of General Interest*, 13 EUR. J. INT'L L. 1221, 1222 (2002).

291. Responsibility of States for Internationally Wrongful Acts, *supra* note 91, at 13.

292. James Crawford, Jacqueline Peel & Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 982 (2001); Int'l Law Comm'n, *supra* note 273, at 355.

293. ICISS REPORT, *supra* note 2, ¶¶ 4.3-9.

294. *Id.* ¶¶ 4.7-9.

295. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 209, at 20.

296. *High-Level Panel Report*, *supra* note 30, ¶ 201.

297. *Id.* ¶¶ 178-182.

of the Security Council.<sup>298</sup> However, within his treatment of the responsibility to protect, he emphasizes that the international community should use “diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.”<sup>299</sup> Only where such measures appear insufficient may the Security Council take action under the U.N. Charter.<sup>300</sup> Although he does not explicitly endorse collective countermeasures, the Secretary-General nevertheless accentuates the importance of collective action outside the U.N. framework with regard to nonforcible measures.

The World Summit also treats sanctions exclusively within the institutional framework of the Security Council.<sup>301</sup> Within the context of the responsibility to protect, the use of diplomatic, humanitarian, and other peaceful means is also limited to action “through the United Nations” and “through the Security Council.”<sup>302</sup>

The impact of the responsibility to protect on the right of states that are not directly affected to resort to countermeasures is ambiguous. On the one hand, the analyzed reports do not explicitly approach this question. And while the responsibility to protect aims at committing states to act when serious crimes occur, it does not explicitly widen the scope of possible actions available to states. As a general principle, a state has to keep within the limits of international law even when acting to fulfill an international obligation.<sup>303</sup> On the other hand, the endorsement of the responsibility to react is built upon the presumption that states have a corresponding right to act. It would be illogical—or at least in need of further explanation—to postulate a responsibility of states to take action when those states had no right to act. With regard to the right to military intervention, the problem of a responsibility to react without such a right—in the absence of an authorization by the Security Council—is openly approached and discussed.<sup>304</sup> With regard to nonmilitary countermeasures, the reports are mostly silent. Thus, the authors of the reports and the states that endorsed the responsibility to protect tacitly authorized the right of not directly affected states to resort to countermeasures when massive human rights violations occur.

This reading is supported by the ICISS Report’s list of possible nonforcible measures within the context of the responsibility to react.<sup>305</sup> According to the ICISS, such measures can be imposed not only by the Security Council but also by the international community of states. At the same time, the measures envisioned by the ICISS would, at least to a large degree, amount to a violation of international law: arms embargoes, financial sanctions and aviation bans usually require a justification. According to the traditional bilateral conception, countermeasures would be limited to states directly affected by a violation of international law. But the human rights

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298. *In Larger Freedom*, *supra* note 37, ¶¶ 109-110.

299. *Id.* ¶ 135.

300. *Id.*

301. World Summit Outcome Document, *supra* note 41, ¶¶ 106-110.

302. *Id.* ¶ 139.

303. Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 91, ¶ 430 (Feb. 26).

304. See ICISS REPORT, *supra* note 2, ¶¶ 6.28-40.

305. See *id.* ¶¶ 4.7-9.

violations that form the basis of the responsibility to protect will usually violate obligations *erga omnes* and not directly violate individual rights of other states. Thus, there would be no state that could execute the sanctions that are enumerated in the ICISS Report. The ICISS Report therefore almost logically requires that the serious violations of human rights—which constitute violations of obligations *erga omnes*—entail the right of every state as a member of the international community to resort to nonforcible countermeasures.

The admissibility of collective countermeasures is a controversial subject. In a number of cases, states have resorted to such countermeasures in response to violations of obligations *erga omnes*, especially if such violations concerned human rights.<sup>306</sup> During the discussions of the ILC on the Draft Articles on State Responsibility, states voiced different concerns against the admissibility of collective countermeasures.<sup>307</sup> Nevertheless, there has been a rather broad acceptance on the side of states with regard to such countermeasures at least when serious breaches of obligations *erga omnes* are concerned.<sup>308</sup> Nonmilitary countermeasures are much more accepted under international law than are unilateral humanitarian interventions. The ILC did not find a clear prohibition on such countermeasures but explicitly left the process open for further development.<sup>309</sup> Against this background, the endorsement of the responsibility to protect can be regarded as an argument in favor of the admissibility of collective countermeasures. The consolidation of such a right will depend on future statements and practices of states, as well as on the reactions of other members of the international community to instances in which states that are not directly affected claim to exercise countermeasures in the interest of the international community.

### 3. *Duty To Act?*

Finally, the question arises whether the conceptual shift proposed by the responsibility to protect entails a legal obligation to act when massive human rights violations occur. International law already imposes limited obligations on states in this regard. The parties to the 1948 Genocide Convention confirm that they undertake to prevent and to punish the crime of genocide.<sup>310</sup> The substantive content of this obligation is, however, rather weak. The Convention deals mainly with punishment and does not substantiate the obligation to prevent genocide. Only Article VIII of the Genocide Convention stipulates that states may call upon competent U.N. organs to take appropriate action for the prevention of genocide.<sup>311</sup> On the other hand, the International Court of Justice emphasized the legal significance of the obligation to prevent

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306. See TAMS, *supra* note 275, at 208-28; Crawford, *supra* note 274, ¶¶ 391-394.

307. See TAMS, *supra* note 275, at 241-49.

308. *Id.* at 248.

309. See Int'l Law Comm'n, *supra* note 273, at 355.

310. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, art. 1, U.N. Doc. A/RES/3/260 A (Dec. 8, 1948).

311. "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." *Id.* art. 7.

genocide in its 2007 judgment in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, where it found that the former Federal Republic of Yugoslavia had violated its obligation to prevent the genocide in Srebrenica.<sup>312</sup> And since the violations encompassed by the responsibility to protect constitute serious breaches of an obligation arising under a peremptory norm of general international law, Article 41(1) of the ILC Articles applies and imposes on states the duty to cooperate to bring such a breach to an end through lawful means.

The responsibility to protect creates no further legal obligations on states. The concept avoids the language of legal obligations, relying instead on the weaker notion of a responsibility.<sup>313</sup> The endorsements following the ICISS Report do not offer any textual hook from which to derive a legal obligation. According to the High-Level Panel, the responsibility to protect has to be exercised through the U.N. Security Council,<sup>314</sup> and the World Summit Outcome Document intentionally avoids any language that could be interpreted as imposing legal obligations on individual states.

In conclusion, current international law does not impose a duty to intervene, and the endorsement of the responsibility to protect does not create such a duty.<sup>315</sup> If any duty is derived from the concept of the responsibility to protect, it is only a moral duty.<sup>316</sup>

## V. CONCLUSION

The concept of the responsibility to protect has been described as the “most dramatic normative development of our time.”<sup>317</sup> From a legal perspective, this characterization has to be relativized. This Note has shown that the endorsement of the responsibility to protect has not significantly impacted international law. The prohibition of the use of force and the principle of nonintervention are left intact. The responsibility to protect adds little to the competences of the U.N. Security Council but rather reaffirms the well-established dynamic reading of Article 39 of the U.N. Charter. The concept does not create legally binding substantive criteria for Security Council action and does not legally restrict the use of the veto power by the permanent members. The responsibility to protect does not legally obligate the Security Council to act. The powers and competences of the General Assembly as well as of regional organizations remain legally unchanged, although the concept reiterates the role of the General Assembly and could lead to a revitalization of the Uniting for Peace Resolution. Furthermore, the responsibility to protect does not support the legality of humanitarian

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312. Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, ¶¶ 427, 438 (Feb. 26.).

313. See *supra* Subsection III.A.2.

314. High-Level Panel Report, *supra* note 30, ¶ 203.

315. Rebecca Barber, *Reflections on the Peacekeeping Failure in Darfur: Is There Any Substance to the 'Responsibility To Protect'?*, 13 J. INT'L PEACEKEEPING 294, 308 (2009); Peters, *supra* note 86, at 536; Stahn, *supra* note 11, at 120.

316. James Pattison, *Whose Responsibility To Protect? The Duties of Humanitarian Intervention*, 7 J. MIL. ETHICS 262, 263 (2008).

317. Thakur & Weiss, *supra* note 83, at 22.

intervention without Security Council authorization. However, with regard to the right of states that are not directly affected to respond with nonmilitary countermeasures to the human rights violations encompassed by the responsibility to protect, the concept can be seen as a further step toward the legality of such countermeasures in the general interest.

From a legal perspective, the normative content of the responsibility is, therefore, evolutionary rather than revolutionary.<sup>318</sup> The responsibility to protect is construed primarily as a nonlegal concept. It is an attempt to establish a more concrete set of criteria and procedures to determine when the responsibility of the international community to intervene is triggered.<sup>319</sup> Responsibility in this sense cannot be equated with a legal obligation or duty, but has to be understood as a political or moral responsibility. This assessment is not meant to diminish the significance of the concept. Political and moral implications may have a much greater impact on the conduct of international actors than legal norms. The responsibility to protect may encourage governments to act in the face of blatant violations of human rights.

This legal conclusion may disappoint proponents of a more progressive approach. Nevertheless, it is important to distinguish between what the law is and what one would like the law to be. It is ultimately the willingness and capability of state representatives that will decide whether and how to implement the responsibility to protect in particular cases. Therefore, only a realistic approach to the applicable legal framework can ensure that the responsibility to protect will not become one of the myriad sophisticated and ambitious concepts that international legal scholarship has produced but that have failed to leave an impression on the reality of international law and politics.

In that regard, the analysis presented in this Note may support the promotion of the responsibility to protect in three ways. First, if it is accepted that the responsibility to protect is already deeply rooted in international law and that its implementation neither requires nor entails significant changes to international law, the discussion can then focus on the real obstacles to the prevention of genocide and other serious human rights violations. The legal framework offers a wide range of measures that states can take individually and collectively as well as through the United Nations and regional organizations. Political problems, rather than legal disagreements, and the lack of will among international actors remain the principal impediment to an effective U.N. collective security system and to the implementation of the responsibility to protect. U.N. Deputy Secretary-General Louise Fréchette noted before the 2005 World Summit: “[I]n many cases, the failure of the international community to protect the vulnerable has been a product of complacency on the part of those who endorse the responsibility to protect, and not from those who have reservations about it.”<sup>320</sup>

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318. Edward C. Luck, *Der verantwortliche Souverän und die Schutzverantwortung* [*The Responsible Sovereign and the Responsibility To Protect*], 56 VEREINTE NATIONEN 51, 56 (2008).

319. Winkelmann, *supra* note 84, ¶ 2.

320. Press Release, Louise Fréchette, U.N. Deputy Sec’y-Gen., “We Must Be Pragmatic and Visionary” To Reach Agreement on Major UN Reform at September Summit, U.N. Doc. DSG/SM/257 (May 20, 2005).

Second, the invocation of the responsibility to protect by the United States in the Iraq invasion and by Russia during the Georgia conflict shows the potential for abuse of the concept, a potential which is rooted in, among other things, the uncertainty that surrounds the status as well as the content of the concept. It therefore seems necessary to clarify the legal rules applicable to nonforcible and military interventions and their relationship to the responsibility to protect. It is not possible to justify an intervention by simply claiming to act in fulfillment of the responsibility to protect. Justifications have to be located within the established rules of international law. While more legal clarity will not entirely prevent future misuse of the responsibility to protect, it might make it more difficult to employ the concept as a pretext for violations of international law.

Third, acknowledging that core components of the responsibility to protect are already part of international law might help to gain political support for implementing and further developing the responsibility to protect. This acknowledgment might rebut the criticism that the "responsibility to protect" is nothing but an apologetic euphemism for humanitarian intervention, carried out by Western states to further their self-interest. To counter its skeptics, the responsibility to protect cannot be perceived as wholly progressive or as a revolutionary concept in international law.

The responsibility to protect is a remarkable political and moral concept that has become established in international politics and scholarship. It does not answer every question or solve every problem but it offers some important conceptual insights into the relationship among sovereignty, responsibility, and intervention. Its three sub-responsibilities constitute a more comprehensive and coherent approach to the prevention and containment of genocide and other massive human rights violations. While it has not significantly changed the international legal framework, it has had an important impact on the political discourse. It remains to be seen whether, in the long run, the responsibility to protect becomes a helpful tool for international decisionmakers that can be deployed in humanitarian crises and help to prevent and contain genocide and other serious human rights violations.